Supreme Court, U.S.
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No. 99-6723

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

vs.

MICHAEL MOORE, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Florida

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

5/4/90	Jesse Tafero is executed in Florida's electric chair
6/20/90	Judias Buenoano's challenge to Florida's electric chair based upon the Tafero execution rejected by 4-3 vote of Florida Supreme Court in *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990)
3/25/97	Pedro Medina is executed in Florida's electric chair
4/10/97	Florida Supreme Court relinquishes jurisdiction to Circuit Court for evidentiary hearing on Leo Jones's All Writs Petition challenging continued use of Florida's electric chair in *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997)
10/20/97	Florida Supreme Court, by 4-3 vote, affirms Circuit Court's opinion upholding constitutionality of continued use of Florida's electric chair in *Jones v. State*, 701 So. 2d 76 (Fla. 1997)
7/8/99	Allen Lee Davis is executed in Florida's electric chair
7/8/99	Thomas Provenzano files All Writs Petition in Florida Supreme Court, challenging continued use of Florida's electric chair
7/8/99	Florida Supreme Court enters Order (Case Nos. 95,959 & 95,973) allowing amendment of All Writs Petition, relinquishing jurisdiction to Circuit Court for evidentiary hearing, and appointing Senior Circuit Judge Clarence T. Johnson, Jr., to preside
8/2/99	Senior Circuit Judge Johnson's Order finding continued use of Florida's electric chair constitutional

9/24/99 Florida Supreme Court, by 4-3 vote, affirms Judge Johnson's Order in *Provenzano v. Moore*, ___ So. 2d ___, 1999 WL 756012 (Fla. Sept. 24, 1999)

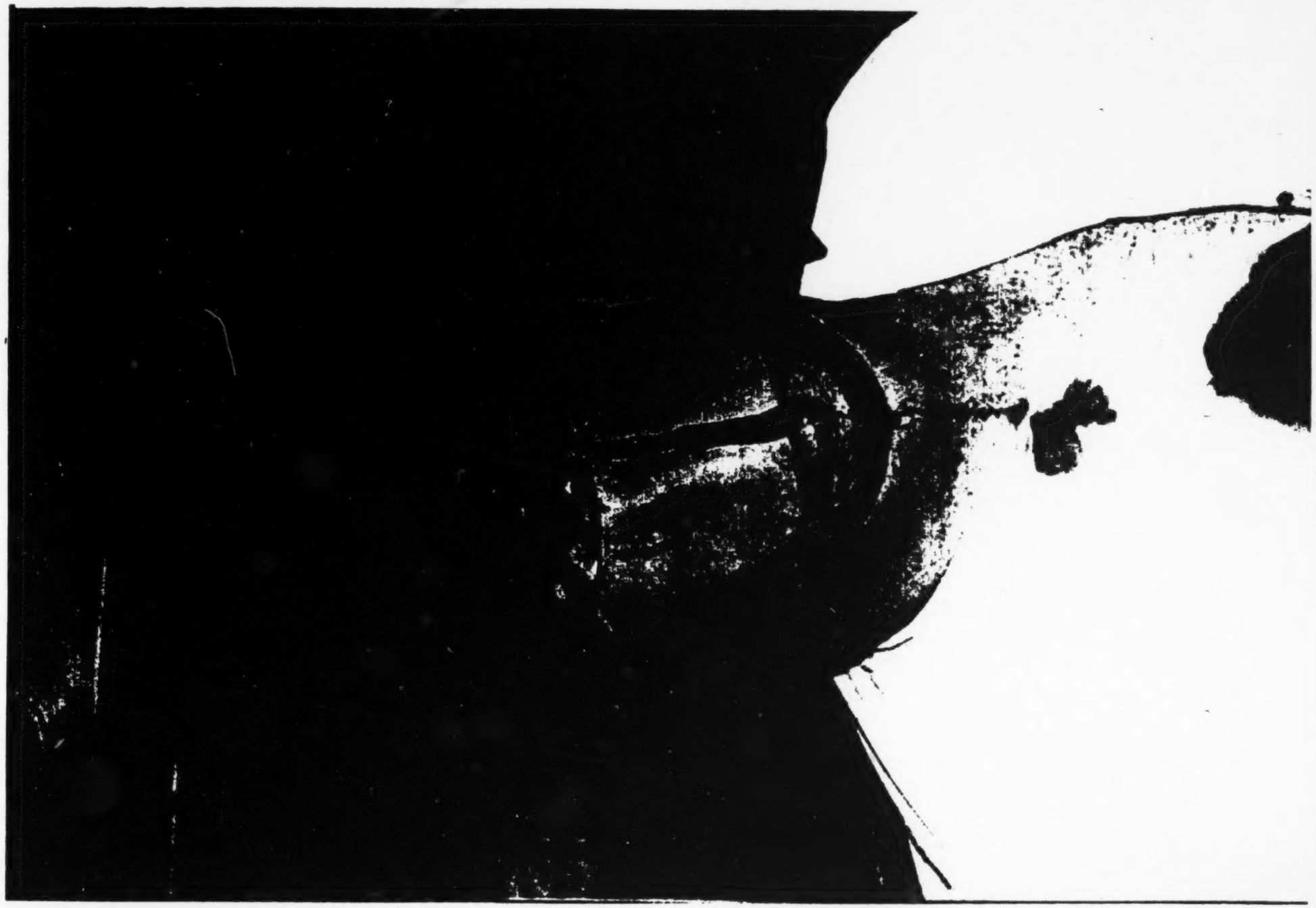
10/5/99 Anthony Braden Bryan files Petition Seeking to Invoke All Writs Jurisdiction of Florida Supreme Court, files a Petition for Extraordinary Relief, and files Motion to Adopt Record and/or Take Judicial Notice of prior proceedings challenging use of Florida's electric chair

10/20/99 Anthony Braden Bryan's Petitions are denied; Florida Supreme Court grants the Motion to Adopt and/or Take Judicial Notice of prior proceedings

10/21/99 Anthony Braden Bryan files his Petition for Writ of Certiorari with the Supreme Court of the United States

10/26/99 Anthony Braden Bryan's Petition for Writ of Certiorari is granted by the Supreme Court of the United States in *Bryan v. Moore*, 120 S.Ct. 394 (1999)

* * *



Supreme Court of Florida

WEDNESDAY, OCTOBER 20, 1999

ANTHONY BRADEN BRYAN,	*	
Petitioner,	*	
	*	
v.	*	CASE NO.
MICHAEL W. MOORE, etc.,	*	96,678
et al.,	*	
Respondents.	*	

****

The Petition Seeking to Invoke this Court's All-Writs Jurisdiction and Petition for Extraordinary Relief is denied.

Petitioner's Motion to Adopt Record and/or Take Judicial Notice is granted. HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

A True Copy
TEST

/s/ Debbie Causseaux
Debbie Causseaux
Acting Clerk,
Supreme Court

[SEAL]

TC

cc: Mr. Andrew Thomas
Mr. Richard B. Martell
Mr. Curtis Golden

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

THOMAS HARRISON PROVENZANO,

Defendant.

_____/

CASE NO.: CR84-835

THOMAS HARRISON PROVENZANO,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary, Florida Department of Corrections, JAMES CROSBY, Superintendent, Florida State Prison, and STATE OF FLORIDA,

Respondents.

_____/

FLA. SUPREME CT. CASE NO.: 95,973

ORDER REGARDING PETITIONER'S "AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND PETITION TO INVOKE THIS COURT'S ALL WRITS JURISDICTION AND PETITION FOR EXTRAORDINARY RELIEF"

(August 2, 1999)

This matter came before this Court pursuant to the order of the Supreme Court of Florida dated July 8, 1999,

relinquishing jurisdiction over this matter and directing this Court "to hold an evidentiary hearing . . . on all issues in respect to the functioning of the electric chair" which were alleged in Petitioner, Thomas Harrison Provenzano's, "Petition for Writ of Habeas Corpus and Petition to Invoke this Court's All Writs Jurisdiction and Petition for Extraordinary Relief and Application for Stay of Execution" filed in the Supreme Court of Florida on July 8, 1999, and in any amended petition filed after that date. On July 22, 1999, Provenzano filed his "Amended Petition for Writ of Habeas Corpus and Petition to Invoke this Court's All Writs Jurisdiction and Petition for Extraordinary Relief" ("Amended Petition"). In the Amended Petition, six other death row inmates were added as petitioners without any attempt to intervene being made either in this Court or in the Florida Supreme Court. Since this Court was directed to hear the Provenzano matter and no others, and since no valid procedural route for intervention was followed, the joinder of Milford Wade Byrd, Eduardo Lopez, McArthur Breedlove, Jerry Haliburton, Gregory Kokal, and Tommy Groover was stricken.

On July 26, 1999, Respondents, Michael W. Moore, Secretary, Florida Department of Corrections, James Crosby, Superintendent, Florida State Prison, and the State of Florida, filed "State's Response to Amended Petition for Writ of Habeas Corpus and Petition to Invoke this Court's All Writs Jurisdiction and Petition for Extraordinary Relief."

On July 27, 1999, through July 30, 1999, this Court held an evidentiary hearing on this matter. At the evidentiary hearing, the testimony of thirty-three witnesses was

presented, and numerous exhibits were received in evidence, including photographs of Mr. Davis after his execution had been carried out but before he was removed from the electric chair. This Court has reviewed the testimony of the witnesses, has examined the exhibits and photographs, and has considered the argument of counsel and the law. Following that careful review and consideration, this Order is hereby entered.

PETITIONER'S ARGUMENTS

In his Petition and at the hearing on this matter, Provenzano raised two main arguments. Those arguments are:

CLAIM I

FLORIDA'S ELECTRIC CHAIR IN ITS PRESENT CONDITION CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT AND ITS USE FOR EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH, CREATES A RISK OF PAIN, AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER.

CLAIM II

FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Further, within Claim I, Provenzano raises several sub-arguments. Those arguments are as follows. To begin with, Provenzano argues that the representations which

resulted in the factual finding that "Florida's electric chair – its apparatus, equipment, and electric circuitry – is in excellent condition," made by the trial court in *Jones v. Butterworth, et al.*, No. 81-4593-CF (Fla. 4th Cir. Ct. July 18, 1997), and the conclusion that "electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment," made by the Supreme Court of Florida in *Jones v. State*, 701 So. 2d 76 (Fla. 1997), were incorrect, Provenzano argues, based upon newly discovered documents, that the condition of chair itself, as well as the electric circuitry was not in excellent condition as was represented in the *Jones* proceedings.

Second, Provenzano argues that the Department of Corrections ("DOC") has not been following, and in fact cannot follow, the Execution Day Procedures ("execution protocol") established in April 1997, as a result of the problems that occurred during the execution of Pedro Medina. Provenzano contends that the execution protocol was written in such a way that it cannot be followed because it does not account for the variations in resistance created by the different characteristics, i.e., weight, muscle tone, fat content, skeletal configuration, size, body build, etc., of each individual inmate's body.

Third, Provenzano argues that the testing of the electric chair is not being conducted in accordance with the Testing Procedures for Electric Chair ("testing protocol") established in, April 1997, as a result of the problems that occurred during the execution of Pedro Medina. He claims that the precise voltage and amperage requirements established in the testing protocol are not being used during the actual tests conducted on the electric chair.

Fourth, Provenzano argues that the resistance created by an inmate's body is different than the representations that were made during the *Jones* proceedings.

Fifth, Provenzano claims that death by electrocution in Florida's electric chair is not instantaneous or painless, and that he will suffer conscious pain because his brain will not immediately cease functioning once the electrical current is applied to him. Additionally, he claims he will suffer disfigurement and mutilation.

Sixth, Provenzano argues that the Florida Department of Corrections ("DOC") has exhibited indifference toward the inmates whom have been executed in the electric chair.

RESPONDENTS' ARGUMENTS

In Response to Provenzano's arguments, Respondents assert that the arguments raised in Provenzano's Amended Petition were previously raised and rejected in the *Jones* proceedings, and that execution by electrocution in Florida's electric chair is being, and will be carried out in the future, within constitutional parameters.

DISCUSSION

The issues of the constitutionality of the death penalty and death by electrocution are not at issue herein as both have previously been declared constitutional. *Gregg v. Georgia*, 428 U.S. 153, S. Ct. 2909, 49 L. Ed. 2d 340 (1976) (The death penalty does not violate the United States Constitution's Eighth Amendment prohibition against cruel and unusual punishment); *Proffit v. Florida*, 428 U.S.

242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) (Florida's death penalty statute is constitutional); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 347, 91 L. Ed. 2d 422 (1947) (Death by electrocution is not cruel and unusual punishment); *Wilson v. State*, 225 So. 2d 321 (Fla. 1969) (Florida's death penalty statute is not cruel or unusual in violation of Article I, Section 17 of the Florida Constitution); *Booker v. State*, 397 So. 2d 910 (Fla. 1985) (Death by electrocution is not cruel or unusual punishment in violation of Article I, Section 17 of the Florida Constitution); *Marek v. State*, 492 So. 2d 1055 (Fla. 1986) (same); *Medina v. State*, 466 So. 2d 1046 (Fla. 1985) (same); *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990) (Florida's electric chair is not cruel or unusual punishment despite a previous malfunction); *Squires v. State*, 565 So. 2d 318 (Fla. 1990) (same); *Hamblin v. State*, 565 So. 2d 320 (Fla. 1990) (same); *White v. State*, 565 So. 2d 322 (Fla. 1990) (same). At issue here is whether the manner in which Florida currently carries out execution by electrocution is constitutional.

"In order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' " *Jones v. State*, 701 So.2d 76, 79 (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 2d 422 (1947)). "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* (quoting *Resweber*, 91 L. Ed. 2d at 464, 67 S. Ct. at 376).

CLAIM I

WHETHER FLORIDA'S ELECTRIC CHAIR IN ITS PRESENT CONDITION CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT AND ITS USE FOR EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH, CREATES A RISK OF PAIN, AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER.

Claim Regarding Condition of Chair and Electrical Circuitry

Provenzano argues, based upon newly discovered documents, that the condition of chair itself, as well as the electric circuitry used to carry out a judicial electrocution was not in excellent condition as was represented in the *Jones* proceedings. Provenzano bases this claim on public records that indicate the wooden chair in which a condemned inmate sits when he or she is executed was replaced with a new wooden chair earlier this year, and on public records that indicate the electrical circuitry of the electric chair has had numerous failings, and that it was not replaced in 1993 or 1994, as was claimed in the *Jones* proceedings.

Although Provenzano alleges that inaccurate claims regarding the replacement of the electrical circuitry were made in the *Jones* proceedings, he has failed to attach the transcript of the *Jones* hearing to support his allegations.

At the hearing in this case, Provenzano did not focus much of his presentation on the replacement of the wooden chair. His argument on this issue, therefore, is primarily contained within his Amended Petition. Therein, he merely argues that based upon the fact that the old wooden chair was replaced with a new wooden

chair, the condition of the chair is different than it was in October 1997 when the Florida Supreme Court decided *Jones*. However, Provenzano does not assert that the new wooden chair is somehow structurally unsound.

Provenzano did focus a great deal of his presentation at the hearing in this matter on the maintenance of the electrical circuitry. Testimony presented at the hearing established that there have indeed been changes to the electrical circuitry of the electric chair. Specifically, Ira E. Whitlock, licensed electrical engineer, testified on behalf of Respondents as an expert in the field of electrical engineering and as an expert in the design and function of the electric chair. Whitlock testified that he has a contract with the Department of Corrections, and that pursuant to that contract, he developed a preventative maintenance program for the electrical circuitry of the electric chair in 1997. He stated that the equipment had not been maintained from its inception in the 1960s until he established the maintenance program, and that it was in a state of disrepair from neglect. This maintenance program involves several stages, including: a cleaning stage; an electrical test to insure the integrity of the equipment; a contact resistance test to measure the microhm resistance across the contacts; hypotensil to make sure the basic insulation level of the circuitry maintains its integrity that it will operate without failure during actual use; ground continuity tests; and ground potential tests. Whitlock testified that in total, he and the individuals working for him do forty or fifty different tests on the equipment. Whitlock testified that these testing procedures are the same procedures he uses in the industrial field. Additionally, Whitlock testified that he

calibrates the equipment and the chart recorder, and that the chart recorder is calibrated for both voltage and current.

Whitlock testified that all three breakers contained within the electrical circuitry of the electric chair were recently refurbished. He refurbished two of them and another company refurbished the third one. Whitlock did the following work on the two breakers: they were disassembled and examined to determine whether they were serviceable or usable; deficiencies were noted and necessary parts were replaced; the contacts were cleaned; electrical tests were performed on them; and, they was reassembled and returned to the Florida State Prison.

Whitlock testified that he had recommended replacement of the breakers, depending on the cost of the replacement. However, it was decided to refurbish rather than replace them. Whitlock testified that although the breakers are old, they are in excellent operating condition.

Whitlock also testified that the electrical circuitry includes a saturated core reactor which limits the current applied to a predetermined set phase.

Whitlock further stated that the Florida electric chair has a chart recorder, but that the chart recorder does not affect the functioning of the electric chair; it simply records events that have taken place.

Whitlock stated that he was present during the execution of Allen Lee Davis, and that the readings produced by the chart recorder indicated that the circuitry operated as it was designed and intended to operate. He

further stated that the accumulation of problems that had arisen from the years of neglect to the equipment have all been addressed.

Bob Hallman testified on behalf of Respondents as an expert in the field of engineering. Hallman testified that the maintenance program that Whitlock testified that he has developed is more comprehensive than most maintenance programs of industrial facilities in that the maintenance is carried out on a more regular and frequent basis, and because it is administered by a professional engineer. Hallman examined the chart recordings for the executions of Daniel Remeta, Leo Jones, Gerlad Stano, and Judy Buenoano. He calculated the level of ohms applied to each of the four inmates. Based upon his calculations, he opined that the equipment appeared to be functioning properly in that the currents that were applied to each individual inmate were regulated to the limits established by the equipment. He further opined that the chart recordings and the calculations derived therefrom indicate the equipment was functioning properly and as it was intended to function. Hallman further testified that the resistance exhibited by the inmates during their executions and the calculations derived therefrom indicate the equipment's testing and application results are all very repeatable. That signifies to Hallman that "we can very well count on or rely upon or predict the results we are going to get before we actually perform it, put the equipment into use."

Hallman also examined the chart recordings from the Davis execution, and determined that the results were consistent and appeared to be very repeatable and consistent with the previous numbers established with regard

to the four prior executions. Hallman testified that he sees no reason to question the overall reliability of Florida's electric chair.

John H. "Jack" McNeill testified that in 1993 or 1994, a "knife switch" or safety switch was installed, and that it is current technology. The knife switch is a spring-loaded switch that closes the receivers and completes the circuit so there is a circuit from the person in the chair to the load side of the executional breaker.

Additionally, McNeill testified that the breakers were thoroughly serviced in February and March of this year. Further, McNeill testified that the old chart recorder was replaced with a chart recorder that is of the latest technology, after the March 1998 executions. McNeill testified the chart recorder records the volts and amps administered during an execution, but that it does not have any effect whatsoever on the actual execution; it merely records data.

Jay Wiechert, a professional engineer licensed by the State of Arkansas, testified as an expert in the fields of electrical engineering and the design of judicial electrocution equipment. He testified that the electrical equipment used in Florida to conduct judicial electrocutions has a regulatory circuit built into it to prevent the current delivered to an inmate from going too high. Wiechert testified that the way the equipment limits the current is by reducing the voltage level. He testified that is precisely what occurred during the execution of Allen Lee Davis. Wiechert stated the variations in the chart recordings from the levels set forth in the execution protocol was a result of the regulatory part of the electrical system

insuring that the levels of voltage and current applied to Davis did not go too high. Wiechert testified the equipment operated the way it was designed to operate during the execution of Davis and during the test conducted on the equipment on July 7, 1999, that it did not malfunction, and that there is no indication that there will be a malfunction in the future.

Execution Day Protocol Claim

Provenzano argues that the Department of Corrections ("DOC") has not been following, and in fact cannot follow, the Execution Day Procedures ("execution protocol") established in April 1997, as a result of the problems that occurred during the execution of Pedro Medina. Provenzano contends that the execution protocol was written in such a way that it cannot be followed because it does not account for the variations in resistance created by the different characteristics, i.e., weight, muscle tone, fat content, skeletal configuration, size, body build, etc. of each individual inmate's body.

The relevant portions of the execution day protocol provide:

> The automatic cycle begins with the programmed 2,300 volts, 9.5 amps, for 8 seconds; 1,000 volts, 4 amps for 22 seconds; and 2,300 volts, 9.5 amps for 8 seconds. When the cycle is complete, the equipment is manually disconnected by _____. The safety switch is then opened by _____.

As stated above, Jay Wiechert testified for Respondents as an expert in the fields of electrical engineering

and the design of judicial electrocution equipment. With regard to the execution protocol, Wiechert testified that the numbers specified in the protocol are average numbers. He stated you cannot specify both volts and amps because the resistive load, or size, of each individual inmate, will determine the relationship between the volts and amps. Wiechert testified that the protocol is not well-written and that he recommended changing the language of the protocol as it presently exists. He would prefer to see a less technical description.

Ira Whitlock testified that he would agree that the language of the protocol should be amended because it is misleading and "probably misrepresents the intended function of the equipment based on its design." Whitlock would change the language so that it is more general.

As Provenzano argues, it is apparent that the execution protocol cannot be exactly followed because it fails to take into consideration the variations in resistance of the inmate's bodies. Resistance (ohms) is measured by dividing the volts by the amps, e.g. 2300 volts divided by 9.5 amps equals 242.1 ohms. Thus, the resistance load dictates the relationship between the volts and the amps.

The system is designed to achieve current (amps), not voltage. The last five executions provided the following:

Inmate	Cycle	Volts	Amps	Ohms
Buenoano	1	2000	9.4	212.8
	2	650	2.9	224.1
	3	1,900	9.4	202.1
Remeta	1	2,100	9.2	228.3
	2	675	2.9	232.8
	3	1,850	8.9	207.9
Stano	1	1,600	9.1	175.8
	2	550	2.9	189.7
	3	1,500	9.0	166.7
Jones	1	1,600	9.1	175.8
	2	500	2.9	172.4
	3	1,450	9.2	157.6
Davis	1	1,500	10	150
	2	600	4.5	133
	3	1,500	10	150

As stated above, Bob Hallman testified that these results were consistent and appeared to be very repeatable, and that he sees no reason to question the overall reliability of Florida's electric chair.

There is nothing magic in the Florida execution protocol: Walter Zant, retired Warden of Warden for the Georgia Diagnostics Center, which is where the sentence of death by electrocution is carried out in Georgia, testified that he witnessed eighteen executions in Georgia,

and observed the voltage and amperage meters. He stated that the highest amps used in these executions was four (4) amps and the lowest was one and one-half (1/2) amps. The Georgia program calls for the following levels of voltage and amperage: two thousand (2,000) volts for four seconds, one thousand (1,000) volts for two seconds, and then two hundred and eight (208) volts for one minute and fifty-four seconds.

Testing Protocol Claim

Provenzano argues that the testing of the electric chair is not being conducted in accordance with the Testing Procedures for Electric Chair ("testing protocol") established in April 1997, as a result of the problems that occurred during the execution of Pedro Medina. He claims that the precise voltage and amperage requirements established in the testing protocol are not being used during the actual tests conducted on the electric chair.

The relevant provisions of the testing protocol provide:

> C. The Test:
>
> After the equipment is examined, remove the natural sea sponges from the saturated saline solution and position in the head piece and leg piece to cover the electrodes. Connect the head piece and leg piece to a repeatable resistive load to measure voltage and amperage. Energize power to the execution control panel. Close safety switch. Energize the execution switch.

> Begin automatic cycle with the programmed 2,300 volts, 9.5 amps, for 8 seconds; 1,000 volts, 4 amps for 22 seconds; and 2,300 volts, 9.5 amps for 8 seconds. After cycling is completed, manually disconnect the equipment at both the execution panel and the safety switch. Shut down all other related operational equipment.

Jay Wiechert testified that he has conducted tests on the electrical equipment used for Florida's electric chair. He stated that he uses a bank of resistors with known ohmic value. Wiechert testified that conducting tests using a bank of resistors, or electrical devices that change electrical energy into heat, with a known resistive load provides repeatable results.

The testing of the electrical system on July 7, 1999, (the day before Davis' execution) was necessarily performed without a human resistance load. However, the system performed within the parameters of the protocol current. It worked as it was designed and intended to work.

Claim Regarding Resistance Created By Inmate's Body

Provenzano argues that the resistance created by an inmate's body is different than the representations that were made during the *Jones* proceedings. This Court was not provided with a copy of the transcript of the *Jones* hearing.

However, as stated above, Jay Wiechert testified for Respondents as an expert in the fields of electrical engineering and the design of judicial electrocution equipment. Wiechert testified that the resistance created by

each individual inmate will vary because of the varying physical characteristics of each inmate.

Claim Regarding Pain Associated with Death By Judicial Electrocution

Provenzano claims that death by electrocution in Florida's electric chair is not instantaneous or painless, and that he will suffer conscious pain because his brain will not immediately cease functioning once the electrical current is applied to him. Additionally, he claims he will suffer disfigurement and mutilation.

In support of his claim, Provenzano presented the testimony of individuals who witnessed the executions of Jesse Tafero, Jerry White, Pedro Medina, Judy Buenoano, Leo Jones, and Allen Lee Davis. These witnesses testified that they heard noises from the individuals being executed, that they observed the bodies of the individuals being executed tighten upon the application of electrical current, and that they observed body movements in the individuals after the electrical current had been applied and turned off. Specifically, these witnesses testified as follows.

Ellen McGarrahan testified that she witnessed the execution of Jesse Tafero as a reporter for the Miami Herald. She stated that when the electrical current was applied to Tafero, his body tensed, and flames and smoke rose from both sides of the head piece. McGarrahan testified the electrical current was then turned off. At that time, she observed Tafero's chest move, and his head nod back and forth. According to McGarrahan, the electrical current was then applied for a second time. McGarrahan

stated that once again, flames and smoke rose from both sides of Tafero's head. She stated that the electrical current was once again turned off. McGarrahan testified that she then saw Tafero's chest and head moving again. McGarrahan testified that the electrical current was then applied to Tafero for a third time. Once again, flames and smoke arose from both sides of Tafero's head. She stated the electrical current was again turned off. McGarrahan testified that after the third application of electrical current, there was no movement from Tafero's body.

Michael Minerva testified that in 1995 while he was the Capital Collateral Regional Counsel for the State of Florida, he witnessed the execution of Jerry White. He stated that once the electrical current was applied to White, White's body stiffened and was thrust upward and backward to the back of the electric chair. Minerva testified that he heard noise that sounded like "air moving through the lips, the throat, that kind of a sound" from White's body. Minerva could not tell whether the air "was coming in or going out."

Glen Dickson testified that he was Pedro Medina's pastor, and that in that capacity, he witnessed Medina's execution. Dickson testified that once electrical current was applied to Medina, smoke and flames rose from Medina's head, and that there was an acrid odor about the witness room. Dickson testified that after the cessation of electrical current and after the strap which had been fastened across Medina's chest had been loosened, Medina's chest moved and he appeared to take three deep, gasping breaths. Dickson stated that there was a period of time in between each breath. Dickson also

stated that after Medina took the third gasping breath, Medina's body slumped.

Gregory C. Smith, Capital Collateral Regional Counsel for the Northern Region, testified that he witnessed the execution of Judy Buenoano. Smith testified that when Buenoano was being secured in the electric chair, it appeared that the strap across her chest was initially secured too tightly. Smith stated that Buenoano grimaced and looked "sharply" at the correctional officer who was tightening the chest strap. Smith testified that after Buenoano indicated she was in pain from the tight strap, the strap was slightly loosened. Smith testified that once the electrical current was applied to Buenoano, her body tensed, and white smoke or steam arose from the electrode that had been placed on her leg. Smith stated that after the electrical current was turned off. Buenoano's body slumped.

Rabbani Muhammad testified that he observed the execution of Leo Jones in his capacity as Jones' spiritual advisor. Muhammad stated that when the straps were placed under his chin, he could see Jones' "flesh bulge from the tightness of the strap." Muhammad testified that once the electrical current was applied to Jones, Jones' body tensed and moved up and back against the chair. Muhammad testified that after the electrical current was turned off, he observed Jones' body move three times in a heaving or spasm-type manner.

Additionally, Muhammad testified that following the execution and after Jones' body had been transported to Tallahassee by a Gainesville funeral home whom he hired to transport Jones' body, he prepared Jones' body for

burial. He stated that while he was preparing the body, he observed wounds on Jones' body which included wounds on the top right and left sides of Jones' head, a burn on Jones' right leg, and a "puncture" in Jones' chest which measured one-eighth of an inch in diameter. Muhammad photographed these wounds, and those photographs were entered into evidence.

John W. Moser, Capital Collateral Regional Counsel for the Middle Region, testified that in his capacity as Capital Collateral Regional Counsel, he witnessed the execution of Allen Lee Davis. Moser testified that between the time Davis was secured in the electric chair and the time the electrical current was applied to Davis, he heard what sounded like two screams from Davis.

Moser testified that when the electricity was applied, Davis' body tensed and arched backward. Moser stated that blood appeared on Davis' chest within seconds of the tensing of his body. Moser did not know exactly when the current was applied to Davis' body, but that approximately three minutes after the time when Davis' body tensed, he observed Davis' chest move in and out several times. Moser stated that at the time he observed Davis' chest move, Davis' body was no longer tensed.

Mark Lazarus, Victim Assistance Administrator for the Florida Department of Corrections, testified that he observed the execution of Allen Lee Davis. Lazarus testified that after the head piece was placed on Davis' head, he heard two one-syllable sounds coming from Davis and that the sounds sounded like Davis was trying to "make some noise" or "yell out." Lazarus also testified that when the electricity was administered to Davis' body,

Davis's body clenched. Additionally, Lazarus testified that while Davis' body was tensed up, blood began to drip from behind the mask. Lazarus further testified that after the electricity was turned off, there was a shuddering in Davis' chest area, like a muscle spasm.

Sheila McAllister, Correctional Probation Officer at Wakulla Correctional Institution, testified that she witnessed the execution of Allen Lee Davis. McAllister testified that when Davis was brought into the execution chamber, his face appeared to be red, but not as red as it appeared to be in the photographs taken of Davis after the execution had been carried out. She stated that when the electrical current was applied to Davis' body, he stiffened and his hands clenched. McAllister also stated that before the electrical current was applied to Davis, he made a couple of moaning sounds. McAllister also testified that while the current was on, she observed blood on Davis' chest, and she observed something dripping from behind Davis' mask. McAllister further testified that after the electrical current had been turned off, and while the first medical person was examining Davis, she observed Davis' chest move three or four times, like muscle spasms; the movements were spaced out with a few seconds in between each of them.

The testimony given by Patricia McCusker, Assistant Superintendent of the Work Camp at Florida State Prison, at the hearing held in Jacksonville in the Leo Jones case was admitted into evidence and read into the record. McCusker testified that she witnessed the execution of Pedro Medina. McCusker testified that when the electrical current was applied to Medina, she observed Medina's left hand tighten, and she observed smoke and

flames coming from Medina's head. She testified that the witness room smelled as if something were burning. McCusker also testified that after the electrical current had been turned off, and while the medical personnel were examining Medina, she observed two or three movements in Medina's chest which were like contractions of the chest muscle.

William R. Dotson, Inspector Supervisor for the Gainesville Field Office with the Department of Corrections' Inspector General's Office, witnessed the execution of Allen Lee Davis as a witness for the Inspector General. Dotson took some of the post-execution photographs of Davis still seated in the electric chair that were admitted into evidence at the hearing. The remainder of the photographs taken of Davis while he was still in the electric chair were taken at Dotson's direction by "Mr. Geibig." Dotson felt photographs of Davis' body were necessary in order to document the event.

Michael R. Collins, employed with Florida State Prison as a nurse, testified that he attended the execution of Allen Lee Davis. Collins testified that after the mouth strap and head piece were put in place and before the electrical current was applied, Davis made one "loud maybe two, three-second high-pitched murmur." Collins also testified that when the electrical current was applied to Davis, Davis' body became rigid and his fingernails turned bright red. Collins further testified that after the electrical current was stopped and after Mr. Matthews, the Florida State Prison physician's assistant, was examining Davis, he observed blood on Davis' shirt in his chest area and on his upper right side, by his collar. Collins stated that the blood was dripping from under the

mask, and that it ceased dripping before Mr. Matthews finished examining Davis.

Steve Wellhausen, employee of Florida State Prison assigned to escort the official witnesses to the execution of Allen Lee Davis, testified that he witnessed Davis' execution. Wellhausen testified that about a minute after the mouth strap was placed across Davis' mouth and after the head piece was placed on Davis' head, he heard Davis make a very low muffled sounding moan. Wellhausen testified that when the electricity was applied to Davis, he observed Davis's hands tighten and his body moved backwards. At some point after the execution began, Wellhausen observed blood coming from beneath the mask. Wellhausen also testified that after the electrical current was discontinued, he observed Davis' body slump, and he observed more than one chest movement which looked like "muscles contracting in the chest." Wellhausen stated these chest movements did not appear to be chest movements associated with breathing. Wellhausen further testified that he had observed similar chest movements in the more than ten prior executions that he has witnessed.

Victor Seryutin, M.D., one of the attending physicians at Florida State Prison, testified that he observed the execution of Allen Lee Davis as the physician assigned to certify when Davis was dead. Seryutin testified that after the electrocution, he observed Davis' chest move a little bit.

Robert K. Thomas, Assistant Maintenance Superintendent at Florida State Prison testified that he is a member of the team who actually fastened the straps that

secured Davis to the electric chair. Thomas testified that he held the mouth strap in place while Mr. Hackle was tightening it. Thomas testified that when Hackle was tightening the mouth strap across Davis' mouth, he heard Davis moan one time. Thomas testified that he did not do anything when he heard Davis moan. Thomas also testified that after he, Mr. Hackle, and Mr. McNeill had secured Davis in the electric chair, during the time that the Warden was on the telephone with the Governor's office, and approximately ten seconds before the current was applied to Davis, he observed two bubbles of blood coming out of Davis' left nostril. Thomas testified that he was able to observe the bubbles of blood because he was standing to the left of Davis and he could see behind Davis' face mask. Thomas stated that he did not notify anyone or do anything else when he observed the blood, and initially did not give a reason as to why he did not notify anyone. However, on cross-examination, Thomas acknowledged that he did not notify anyone or do anything because he knew the executioner was getting ready to pull the switch. Thomas also testified that after the current was turned off and while Mr. Matthews was examining Davis, he observed Davis' body heave one time.

John H. "Jack" McNeill, Utility Supervisor for Florida State Prison, testified that he is part of the team that helped secure Allen Lee Davis into the electric chair. He testified that he heard Davis grunt when he put the waist strap on Davis, and heard Davis grunt again when Mr. Thomas tightened the chin strap for the head piece.

William Muse, Lieutenant with the Florida Department of Corrections, assigned to Florida State Prison,

testified that he witnessed the execution of Allen Lee Davis. He testified that he heard Davis moan after the mouth piece was put in place and while he was being strapped into the electric chair. Muse testified that after the cycle of current had been terminated, he observed blood on Davis' shirt, blood on the strap, and blood coming from Davis' nostril. Muse also testified that while Mr. Matthews was examining Davis, he observed Davis' chest move up and down two times, like Davis was exhaling.

Thomas Varnes, Warden at Wakulla Correctional Institution testified that he witnessed the execution of Allen Lee Davis. Varnes testified that after the mouth strap and chin strap of the head piece were tightened and the face mask was lowered, he heard Davis moan like he was trying to say something. Varnes stated the moans occurred before the electrical current was applied to Davis. Varnes also testified that after the electrical current had been turned off, he observed blood by the "top strap," and that the blood began to appear on Davis' shirt. Varnes stated that he thought the nose bleed may have something to do with the high blood pressure that Davis was reported to have. Varnes testified that he has high blood pressure and that it is not unusual for him to have a nose bleed. He testified that when he has such a nose bleed, he does not suffer from any pain.

Aubrey D. Thornton, Assistant Warden at Florida State Prison, testified that he was one of the individuals responsible for strapping Allen Lee Davis into the electric chair. Thornton testified that he was one of three people responsible for securing the mouth strap on Davis. Thornton testified that he stood in front of Davis and

positioned the mouth strap on Davis, and that the Maintenance Superintendent buckled the mouth strap to the back of the chair. Thornton stated that he was one of the individuals involved in the drafting of the execution protocol, and that the mouth strap was placed on Davis in accordance with the execution protocol. Thornton testified that the mouth strap, as it appears in Petitioner's Exhibit 1-A was not in the same position that it was in when Thornton positioned it on his [sic] prior to the execution. Thornton testified that the mouth strap was higher and closer to Davis' nose. Thornton also testified that Davis' face began to turn red after the mouth strap was applied to him, but that Davis did not appear to have any difficulty breathing. Thornton also testified that he heard Davis moan. Furthermore, Thornton testified that if any of the Department of Corrections personnel in the execution chamber notice anything unusual while they are securing an inmate to the electric chair for execution, they are authorized to bring it to his attention or to the attention of Warden Crosby. However, he would not expect the person to bring it to his attention prior to the application of electrical current.

James Crosby, Warden of Florida State Prison testified that after the mouth piece was placed on Davis, and just before the execution, he heard two muffled sounds from Davis, which sounded like Davis was trying to say something.

William F. Mathews, P.A., physician's assistant for Florida State Prison, was assigned the duty to determine whether Allen Lee Davis was dead after the conclusion of the application of electrical current to him during his judicial electrocution. Matthews testified that he had a

clear view of Davis when the mouth strap was applied to him and that the mouth strap was not impinging on his nose in any way, and that Davis did not appear to have any difficulty breathing. Matthews testified that after the electrical current was turned off, he approached Davis and for approximately two minutes, tried to see if Davis had a palpable radial pulse. Matthews testified that he did not detect a pulse. Matthews testified that he then loosened the chest strap and listened to Davis' chest for any heart sounds. Matthews stated that when he loosened the chest strap, Davis' body relaxed and slumped forward, and that he did not detect any heart sounds. Matthews also testified that he listened to Davis' chest for lung sounds, but that he did not detect any. Matthews further testified that while he was examining Davis, he observed Davis' chest or upper torso move two times with about a minute or minute and a half between each movement. Matthews described this movement as muscular movement in the chest and shoulder areas. During that period of time, Davis did not exhibit any signs of life. Matthews also testified that after the head piece was secured to Davis' head and before the electric current was applied, he heard Davis make noises like Davis was trying to say a few words.

Donald Price, Ph.D., neurophysiologist and psychologist at the University of Florida, who carries out research on pain mechanisms and on pain behavior and pain perception, testified as an expert for Provenzano in neurophysiology. Price has conducted research involving primarily low voltage electricity, and he has not done any studies with regard to the levels of voltage and currents applied in judicial electrocutions. Price is of the opinion

that "judicial electrocution results in considerable enormous pain and suffering as well as other negative emotional experiences." Price testified that pain could be elicited through the tightening of the straps; through the penetration of the brain with electrical currents, and through peripheral stimulation of body tissues. Price also testified that he is of the opinion that "it is highly, highly unlikely that the initial current surge would instantly and permanently depolarize or incapacitate the human brain." Price testified that the kinds of behavior indicative of pain include moaning, screaming, gasping for air, moving the head from side to side, writhing movements in the chair. Price further testified that people's facial expressions can be indicative of pain. Price testified that the facial expressions captured in the photographs of Davis after his execution while he was still seated in the electric chair, which were admitted into evidence as Petitioner's Exhibit 1, are indicative of pain.

J. Patrick Reilly, M.S., testified for Provenzano as an expert in the effects of electricity on biological systems. He testified that it is his opinion that the temperature rise during the entire thirty-eight second cycle of a judicial electrocution is insufficient to thermally damage the tissues of the brain, and that the current is too strong to result in a high probability of fibrillating the heart after completion of the execution.

John Wickswo, Ph.D., testified for Provenzano as an expert in the areas of physics, electromagnetics, biological physics, biomedical engineering, and nondestructive testing. Dr. Wickswo opined that the Florida electric chair does not cause instantaneous and painless death and that

there is no scientific threshold current or voltage level that would effectuate instantaneous and painless death.

Robert Kirschner, M.D., forensic pathologist from Illinois, testified as an expert in the area of forensic pathology. Kirschner testified that he performed an autopsy on the body of Allen Lee Davis. He testified that during Davis' autopsy, he was unable to identify the precise source of the nose bleed that Davis suffered, but that it was coming from the septal area of the left nostril. Kirschner testified that the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of electrical current to him. Kirschner testified that he is of the opinion that Davis' death was caused by electrocution and association of partial asphyxiation which occurred before the electrocution. Kirschner further testified that he is of the opinion that Davis was suffering from conscious pain during the period of asphyxiation.

Kris Sperry, M.D., Chief Medical Examiner for the Georgia Bureau of Investigation, testified for Respondents in the area of forensic pathology. Sperry was present as a witness during Kirschner's autopsy of Allen Lee Davis. Sperry opined that he [sic] application of ten amps of current to brain tissue causes instant depolarization and instant loss of consciousness. Sperry testified that an unconsciousness person cannot feel pain, and that death from irreversible brain damage occurs within seconds of the application of the current because the brain is heated well above a temperature from which it can recover. Sperry testified that seventy-five milliamps (75/1000 of an amp), externally applied to the body causes fibrillation

of the heart. Sperry also testified that one amp of current applied externally to the body is sufficient to cause asystole, or complete stoppage of the heart. Sperry opined that after the heart is stopped, spontaneous heart movement may begin again, but the heart is irreversibly damaged and cannot recover. However, after the heart has stopped, agonal sounds and movement may still occur, as they are part of the last vestiges of life. Sperry also testified that an individual does not need to still be alive in order to bleed. Sperry testified that blood can drain from an individual for hours after the individual is dead.

Sperry further opined that the nose bleed suffered by Davis did not result from the placement of the strap across Davis' mouth, but that it occurred from some sort of increased pressure in Davis' upper torso or head region.

The deposition of William Hamilton, M.D., Medical Examiner for the Eighth Judicial Circuit, was read into the record due to Hamilton's unavailability. Hamilton was accepted as an expert testifying an behalf of Respondents in the field of pathology. Hamilton testified that he performed an autopsy on Allen Lee Davis. Hamilton testified that Davis had burns on his scalp and forehead, on his superpubic and right upper medial thigh region, and behind the right knee. Hamilton testified that he has performed autopsies on approximately thirty death row inmates who have been executed in Florida's electric chair. He stated that the burns on the heads and legs of the inmates executed within the last five or six years have been smaller than those that were observed on inmates

who were executed years ago. Hamilton testified that these burns are post-mortem burns.

Hamilton testified that upon his examination of Davis, he observed that there was blood in Davis' naval [sic] cavity, but that he did not dissect the paranasal sinuses to find the cause. Hamilton testified that it appeared to be an ordinary nosebleed, and that if the electrical current had not been applied to Davis at that time, he would not have had the nose bleed.

Hamilton further testified that in his opinion, the delivery of ten amps to the human body with the path of the current being from the head to the leg results in immediate death, immediate loss of consciousness, immediate massive depolarization of the nervous system, and a rapid rise in the temperature of the internal tissues in the path of the current. He opined that the path of current would be from the top of the head through the brain and brain stem, through the center of the body, and then exiting through the electrode on the leg. Dr. Hamilton opined that immediate death would also result if the current were only four amps.

B.J. Wilder, M.D., Professor Emeritus at the University of Florida in neurology and neuroscience, testified on behalf of Respondents in the areas of neurology and neurophysiology. Wilder testified that during electroconvulsive therapy, in which the brain is stimulated with electricity to produce a controlled convulsion, two hundred and fifty to three hundred milliamps, or 250/1000 to 300/1000 of one amp, is used. Wilder testified that electrical currents of this level cause the patient to lose consciousness, and that upon regaining consciousness, the

patient does not report pain. Wilder opined that the introduction of ten amps of electrical current by the means of a head-to-leg electrode, with one thousand five hundred volts would cause the individual to lose consciousness within a matter of milliseconds. Further, Wilder opined that the administration of one thousand five hundred (1,500) volts at ten (10) amps for eight seconds, followed by seven hundred (700) volts at four and one half ($4^1/_2$) amps for twenty-two seconds, followed by one thousand five hundred (1,500) volts at ten (10) amps for four seconds would cause a massive depolarization of every cell in the cerebral cortex, and would in probability cause a depolarization of cells in deep brain structures, such as the brain stem and the thalamus. Wilder further opined that the damage caused by such a massive current would be of such a magnitude that the brain cells would not recover. Wilder stated that an inmate would not perceive pain, fear, or anger once such a current is turned on. Wilder further testified that the brain dies before the body does, and spontaneous movements seen after electrocution in the electric chair are agonal.

Tim Bullard, M.D., who is Board Certified in emergency medicine and internal medicine, testified on behalf of Respondents as an expert in the field of emergency medicine. Dr. Bullard testified that he has treated patients with electrical injuries. He testified that fifty (50) to one hundred (100) milliamps of electrical current would cause the heart to fibrillate. Bullard further testified that any movements made by an individual after he received ten (10) amps of current and one thousand five hundred (1,500) volts administered by means of a head-to-leg current path for eight seconds, followed by 4 amps and six

hundred fifty (650) volts) for twenty-two seconds, followed by ten (10) amps and one thousand five hundred (1,500) volts for four seconds, would be agonal movements.

Walter Zant, former Warden for the Georgia Diagnostics Center, which is where the sentence of death by electrocution is carried out in Georgia, testified on behalf of Respondents. Zant testified that the execution by electrocution process in Georgia involves the following levels of voltage and amperage: two thousand (2,000) volts for four seconds, one thousand (1,000) volts for two seconds, and then two hundred and eight (208) volts for one minute and fifty-four seconds. He stated that during the eighteen executions that he was involved in, he never observed the amperage level during a judicial electrocution go higher than four amps. Zant testified that in Georgia, the inmate is placed in the electric chair and secured in the chair by a strap across his chest, a strap around his waist, a strap on each thigh, a strap on each ankle, a strap on each upper arm, and a strap on each wrist. Zant testified that the inmate's head is secured by a chin strap which is placed around the chin and strapped to a head post on the chair itself. The purpose of the chin strap is to prevent movement of the head and to prevent movement in the electric chair. Zant stated it is "necessary in order to carry out the execution in a humane manner." Zant testified the chin strap is leather and that it looks like the chin strap on a football helmet. Zant further testified there is a strap that goes under the inmate's chin to keep the electrodes in the headgear on the inmate's head during the execution process. Zant stated the straps are affixed "very tight." Zant further

testified that although both straps force the inmate's mouth closed, they do not touch the inmate's lips or inhibit the inmate from opening his lips and breathing through his mouth.

Claim Regarding Alleged Indifference Toward Inmates Who Have Been Executed

Provenzano argues that the Florida Department of Corrections ("DOC") has exhibited indifference toward the inmates whom have been executed in the electric chair. In support of his argument, Provenzano presented the testimony of Gregory Smith. As set forth above, Smith testified that when Buenoano was secured into the electric chair, the strap across her chest was too tight. It is important to note, however, that Smith also testified that when Buenoano grimaced and looked at the officer securing the strap, the strap was loosened slightly.

Provenzano also presented the testimony of Mark Lazarus to support this argument. Lazarus testified that although water dripped onto the front and back of Davis' shirt, the water was not wiped off of him. This was despite Lazarus' statement that the water that dripped onto the floor had been mopped up.

Dr. Victor Seryutin's statement that he is not under any obligation to provide any treatment to an inmate who is about to be executed also supports Provenzano's claim. Seryutin testified that his sole purpose there is to certify when the inmate is dead.

Further, the testimony of Robert Thomas that he tightens the straps as tight as he can, and that he did nothing when he heard Davis moan may provide some

support for Provenzano's claim. However, Thomas' testimony was countered by Jack McNeill's testimony that his main concern it [sic] to tighten the straps so the inmate will not hurt himself or hurt anybody standing around him.

The testimony of Warden James Crosby was especially important on this issue. Crosby has taken great effort to ensure that execution in Florida is carried out in a constitutional manner. He has spent a great amount of time studying and gaining an understanding of the process and the protocols developed to implement it. He testified that he had not been informed that Thomas had seen bubbles of blood before the current had been applied to Davis, he stated that he would have expected Thomas or any of the other officers involved in the execution process to immediately report any problem to him. Crosby further stated that he was going to fix that problem.

Additionally, Crosby stated that he would expect the straps to be tightened so they are snug, but that he would not expect the straps to be tightened as tight as they could be pulled.

With regard to the water, Crosby testified that although he would not want water to be dripping [sic] an inmate's face, it is important for the head sponge to be sufficiently wet.

Execution in the electric chair invokes emotional responses such as fear and dread. It involves some necessary pain and discomfort when the straps are applied and tightened. However, strapping is necessary to minimize

movement and insure the firm placement of the electrodes. While the mouth strap is used to secure the head to the chair, its design leaves something to be desired.

CLAIM II

WHETHER FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Provenzano asserts that Florida is one of only four states that still employs electrocution as the manner by which the sentence of death is carried out. This issue is beyond the scope of the issue which this Court was ordered to decide. However, having said that, this Court concludes that said issue has already been decided adversely to Provenzano. *See Jones v. State*, 701 So. 2d at 79 (citing *Campbell v. Wood*, 18 F. 3d 662, 682 (9th Cir. 1994) ("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."); *Hunt v. Nuth*, 57 F. 3d 1327, 1338 (4th Cir. 1995) ("[T]he existence and adoption of more humane methods [of execution] does not automatically render a contested method cruel and unusual.")

FINDINGS OF FACT

Based upon the foregoing, and by the greater weight of the evidence, the Court hereby makes the following findings of fact.

1) During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. Although the breakers and other components of the electrical circuitry are old, the electric circuitry is adequate to assure the proper functioning of the electric chair.

2) The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court. The execution protocol merely states: "The automatic cycle **begins** with the programmed 2,300 volts, 9.5 amps, for 8 seconds . . . . " (emphasis added). The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed.

The execution protocol does not take into account the varying levels of resistance created by each and every inmate. The resistance created by each executed inmate's body, or ohms, can be determined by dividing the number of volts administered by the number of amps administered. Since the level of resistance varies from inmate to inmate, these figures must necessarily vary. The variations in these figures do not violate the execution protocol.

3) The death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap.

4) Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.

5) The nose bleed incurred by Allen Lee Davis began **before** the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.

6) The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

7) The use of a mouth strap ~~to~~ secure an inmate's head to the electric chair may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.

8) Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [sic] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained.

CONCLUSION

Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not

constitute cruel or unusual punishment, and therefore, is not unconstitutional.

DONE and **ORDERED** on this 2nd day of August, 1999.

/s/ Clarence T. Johnson, Jr.
CLARENCE T. JOHNSON, JR.
Senior Judge
FSC Order 2000R-269

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 1999, a true and correct copy of the foregoing was furnished by U.S. mail and facsimile transmission to:

1) **Katherine V. Blanco, Assistant Attorney General, Carol M. Dittmar, Assistant Attorney General, Kenneth Nunnelly, Assistant Attorney General, and Carolyn Snurkowski, Assistant Attorney General**, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607-2366, fax (813) 871-7834;

2) **John Moser, Capital Collateral Regional Counsel – Middle, Harry P. Brody, Assistant CCRC**, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, fax (813) 740-3554;

3) **Jay Taylor, Assistant State Attorney**, Fourth Circuit of Florida, 330 East Bay Street, 600 Duval County Courthouse, Jacksonville, Florida 32202; fax (904) 630-1848; and

4) **Susan Maher, Deputy General Counsel, Department of Corrections**, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500, fax (850) 922-4355;

5) **Tanya Carroll, Deputy Clerk Capital Cases,** Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, fax (850) 488-2100.

/s/ Erin J. O'Leary
Senior Trial Court
Staff Attorney

Supreme Court of Florida

THOMAS H. PROVENZANO,
Petitioner,

vs.

MICHAEL W. MOORE,
Respondent.

No. 95,973

[September 24, 1999]

PER CURIAM.

Thomas H. Provenzano, at a time when he was under warrant of death, filed a petition for writ of habeas corpus, a petition to invoke this Court's "all writs" jurisdiction, and a petition for extraordinary relief. In order to give this matter full consideration, this Court entered a stay of execution on July 8, 1999. This Court directed the circuit court to hold an evidentiary hearing regarding the functioning of the electric chair. Following that four-day hearing, the circuit court rendered findings of fact with respect to the functioning of the electric chair and concluded that the electric chair does not constitute cruel or unusual punishment. These findings of fact are the subject of this appeal. We have jurisdiction pursuant to article V, sections 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we affirm the circuit court's order.

During the evidentiary hearing on this matter, both parties presented several witnesses, including testimony from experts. Most of the testimony focused on alleged errors committed by the Department of Corrections

(DOC) during recent executions, particularly the execution of Allen Lee Davis on July 8, 1999. At the conclusion of the hearing, the circuit court entered an order denying relief, wherein it made the following findings of fact:

> (1) During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. Although the breakers and other components of the electrical circuitry are old, the electric circuitry is adequate to assure the proper functioning of the electric chair.
>
> (2) The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court. The execution protocol merely states: "The automatic cycle *begins* with the programmed 2,300 volts, 9.5 amps, for 8 seconds. . . . " (emphasis added). The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed.
>
> The execution protocol does not take into account the varying levels of resistance created by each and every inmate. The resistance created by each executed inmate's body, or ohms, can be determined by dividing the number of volts administered by the number of amps administered. Since the level of resistance varies from inmate to inmate, these figures must necessarily vary. The variations in these figures do not violate the execution protocol.
>
> (3) The death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap.

(4) Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.

(5) The nose bleed incurred by Allen Lee Davis began *before* the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of the initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.

(6) The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

(7) The use of a mouth strap to secure an inmate's head to the electric chair may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.

(8) Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [to] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained.

The circuit court also made the following conclusion of law:

> Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

Provenzano raises four arguments regarding the circuit court's order. First, Provenzano asserts that the circuit court erred in concluding that the electric chair did not constitute cruel or unusual punishment. Provenzano alleges three different bases for this conclusion: (1) the electric chair causes pain, both in preparing for and during the electrocution, (2) the electrical circuitry has not been maintained, and (3) DOC has failed to follow protocol.

This Court recently concluded in *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' " (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)). The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.

In *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)), this

Court stated, "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " We find that the circuit court's findings of fact are supported by competent, substantial evidence. Therefore, we again conclude, as we did in Jones, that Florida's electric chair is not cruel or unusual punishment.

We are aware that the record contains numerous references from witnesses, including State witnesses, that the execution protocol is not well written. There is also a recommendation from the circuit court for DOC to employ "a smaller and/or redesigned mouth strap." We conclude that there is competent, substantial evidence to support the circuit court's finding of fact that the execution protocol was not violated in the Davis execution. However, it may be appropriate for DOC to revisit the protocol, including the use of the mouth strap, to ensure that it is consistent with the functioning of the electric chair.

In issue two, Provenzano claims that Florida's current use of electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. This claim was rejected by this Court in *Jones*. *See* 701 So. 2d at 79.

In issue three, Provenzano claims that the circuit court made numerous erroneous evidentiary rulings during the evidentiary hearing,[1] thereby denying him a full and fair hearing. In *Heath v. State*, 648 So. 2d 660, 664 (Fla. 1994), this Court stated that "[t]he trial court has broad discretion in determining the relevance of evidence and such determination will not be disturbed absent an abuse of discretion." Provenzano has not demonstrated that the circuit court abused its discretion on these evidentiary rulings.

In issue four, Provenzano claims that the circuit court erred when it struck additional petitioners from Provenzano's petition for relief in this case. We find no merit to this issue. The order in this case directing the circuit court to hold an evidentiary hearing was specific as to the parties in this case. Further, a similar motion to intervene was denied by this Court in *Jones v. State*, No. 90,231 (order filed July 3, 1997).

Accordingly, for the reasons expressed in this opinion, we affirm the circuit court's order finding that the electric chair is not unconstitutional. No motion for rehearing will be permitted.

It is so ordered.

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[1] Provenzano claims that the circuit court erred in ruling that the testimony of two potential witnesses (Thomas Crapps and Richard Martell) was precluded. Provenzano also claims that the circuit court erred in sustaining the State's objections to questions concerning certain testimony from witnesses Rabbani Muhammed and A.D. Thornton.

HARDING, C.J., and WELLS, LEWIS, and QUINCE, JJ., concur.

HARDING, C.J., concurs specially with an opinion, in which LEWIS, J., concurs.

WELLS, J., concurs with an opinion, in which QUINCE, J., concurs.

QUINCE, J., concurs specially with an opinion, in which WELLS, J., concurs.

SHAW, J., dissents with an opinion, in which ANSTEAD, J., concurs.

ANSTEAD, J., dissents with an opinion, in which SHAW, J., concurs.

PARIENTE, J., dissents with an opinion, in which ANSTEAD, J., concurs.

HARDING, C.J., specially concurring.

I write separately for two reasons. First, I write to explain the reasons that I concur with the majority opinion regarding the constitutionality of the electric chair. Second, I again urge the Legislature to offer lethal injection as an alternative method of execution.

I. Constitutionality of the Electric Chair

I agree with the majority in upholding the circuit court's findings regarding electrocution as a constitutional method of execution. While I am disturbed by the graphic photographs of Allen Lee Davis' body following his July 8, 1999, execution, I do not find this alone enough to deem electrocution "cruel or unusual" punishment.

"Since it is the *method* of execution that is challenged, it follows that a court must focus on the procedure as a whole and over time, rather than on any one particular execution." *Fierro v. Gomez*, 865 F.Supp. 1387, 1411 n.25 (N.D.Cal. 1994) (permanently enjoining California from executing inmates by lethal gas), *aff'd*, 77 F.3d 301 (9th Cir.) (affirming injunction based on district court's factual findings regarding pain), *vacated*, 519 U.S. 918 (1996) (vacating judgment and remanding for further consideration in light of California's subsequently amended death penalty statute providing that lethal injections should be used to carry out death sentences unless the defendant requests that the State use the gas chamber). As explained by the district court in *Fierro*, the key question to be answered in a challenge to the method of execution is how much pain the inmate suffers. *Id.* at 1411. Where "unconsciousness is 'likely to be immediate or within a matter of seconds' " the method is within constitutional limits. *Id.* (quoting *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (finding that Washington's execution by judicial hanging did not violate prohibition against cruel and unusual punishment)). The record in the instant case contains competent, substantial evidence to support the conclusion that Davis was rendered unconscious instantaneously when the current was applied. This Court may not arbitrarily overturn the circuit court's finding based upon conflicting evidence in the record. *See Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976) ("It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as pointed out in *Westerman [v. Shell's City, Inc.*, 265 So. 2d 43

(Fla. 1972),] is whether the judgment of the trial court is supported by competent evidence.").

II. Lethal injection: The Need for Legislative Action

However, as I suggested in my concurring opinion in *Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997) (Harding, J., specially concurring), I urge the Legislature to revisit this issue and pass legislation giving death row inmates the choice between lethal injection and electrocution as the method of carrying out the death penalty. *See* Art. I, § 17, Fla. Const. ("Methods of execution may be designated by the Legislature."); *see generally, e.g.*, Ariz. Rev. Stat. Ann. § 13-704(b) (West Supp. 1998) (defendant sentenced to death for offense committed prior to date of amended statute shall choose either lethal injection or lethal gas; execution by lethal injection if the defendant fails to choose method); Cal. Penal Code § 3604(b) (West Supp. 1999) (same); S.C. Code Ann. § 24-3-530(A) (Law Co-op. Supp. 1998) (election between electrocution and lethal injection; if defendant waives right of election, then penalty must be administered by lethal injection); Utah Code Ann. § 77-18-5.5 (1995) (election between firing squad and lethal injection; where no preference is stated, execution is by lethal injection); Va. Code Ann. § 53.1-234 (Michie 1998) (election between electrocution and lethal injection; lethal injection where prisoner fails to choose in timely manner); Wash. Rev. Code § 10.95.180(1) (1998) (death shall be inflicted by lethal injection unless defendant elects hanging).

Florida death row inmates almost routinely challenge electrocution as a cruel or unusual method of punishment. *See, e.g., Davis v. State*, 24 Fla. L. Weekly S345, (Fla. July 1, 1999), *cert. denied*, 68 U.S.L.W. 3136, (U.S. July 7, 1999), *and cert. denied*, 68 U.S.L.W. 3136, (U.S. July 7, 1999); *Remeta v. State*, 710 So.2d 543, 546 (Fla.), *cert. denied*, 118 S. Ct. 1383 (1998) *Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997), *cert. denied*, 118 S. Ct. 1297 (1998); *Stano v. Singletary*, 692 So.2d 180, 181 (Fla. 1997). Such challenges consume an inordinate amount of the time and resources expended by inmates' counsel, State counsel, and judicial personnel. Furthermore, each time an execution is carried out, the courts wait in dread anticipation of some "unforeseeable accident" that will set in motion a frenzy of inmate petitions and other filings. *See Jones*, 701 So.2d at 76 n.1, 77 (discussing Pedro Medina's 1997 execution, where flames were seen near the headpiece of the electric chair and smoke emanated from under the headpiece; circuit court found that flame and smoke were caused by insufficient saline solution on the sponge in the headpiece of the electric chair); *Buenoano v. State*, 565 So.2d 309, 310-11 (Fla. 1990) (discussing flames and smoke that erupted from the headpiece of the electric chair during the 1990 execution of Jessie [sic] Tafero; investigation concluded that the irregularities in Tafero's execution were caused by the use of a synthetic sponge).

It is my view that the Legislature can foreclose many of these claims by simply amending Florida's death penalty statute to provide that death sentences should be carried out by lethal injection unless the defendant requests execution by electrocution. *See Fierro v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998) (finding that California

inmates lacked standing to challenge constitutionality of execution by lethal gas and claims were not ripe for decision where the inmates had not chosen execution by lethal gas); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) (finding that similar challenge to identical Arizona statute was not ripe because inmate had not chosen lethal gas as method of execution). While an inmate's choice of electrocution would not constitute a waiver of his or her Eighth Amendment protections and would not foreclose a constitutional challenge to this method of execution, *see LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999), the alternative method of lethal injection would still be available even if a constitutional challenge of electrocution proved successful. *See id.* at 1149 (ordering that no inmates be executed by lethal gas and that inmate bringing challenge could not be executed pursuant to the existing death warrant which required execution by lethal gas, but also recognizing that warrant could be "reissued in a form that does not require execution by lethal gas").

Although not determinative of the Eighth Amendment claim, I find it significant that a number of other states that once relied on electrocution as the sole means of execution have now either entirely abandoned this method or offered an alternative. Nineteen of the states that currently permit capital punishment specified in 1970 that electrocution was the exclusive form of capital punishment. *See Fierro*, 865 F.Supp. at 1406. Today, of the thirty-eight states that permit capital punishment for the crime of first-degree murder, only four states rely on electrocution as the exclusive form of punishment. *See* Fla. Correct. Comm'n, *1997 Supplemental Report on Execution Methods Used by States* at 48 (June 20, 1997) (on file

with Library, Fla. Sup. Ct.) [hereinafter Commission Report]; Ky. Rev. Stat. Ann. § 431.220 (Michie Supp. 1998) (establishing lethal injection as the sole means of capital punishment for defendants receiving death sentence on or after March 31, 1998, and giving the choice of electrocution or lethal injection to those prisoners sentenced prior to March 31, 1998); Tenn. Code Ann. § 40-23-114 (Supp. 1998) (establishing lethal injection as the sole means of capital punishment for defendants receiving death sentence on or after January 1, 1999, and giving the choice of electrocution or lethal injection to those prisoners sentenced prior to January 1, 1999). In contrast, thirty-four states offer lethal injection either as a choice or as the exclusive form of punishment. *See* Commission Report at 48; Ky. Rev. Stat. Ann. § 431.220; Tenn. Code Ann. § 40-23-114. Clearly, the modern trend is towards rejecting electrocution as a method of capital punishment. In fact, in the 1997 report submitted to the Governor and the Legislature by the Florida Corrections Commission, the Commission recommended that Florida permit lethal injection as an alternative method of execution. *See* Commission Report at 28.

Finally, it is important to note that several courts, including the United States Supreme Court, have held that it is not an ex post facto violation to apply a change in execution methods retroactively. *See Malloy v. South Carolina*, 237 U.S. 180, 185 (1915); *Hernandez v. State*, 32 P.2d 18, 25 (Ariz. 1934) (upholding amendment to statute which changed method of capital punishment from hanging to lethal gas); *DeShields v. State*, 534 A.2d 630, 639 n.7 (Del. 1987) ("A statute which provides an optional method of death is not ex post facto legislation or an

unlawful bill of attainder."); *State ex rel. Pierre v. Jones*, 9 So. 2d 42, 46 (La. 1942) (upholding amendment to statute which changed method of capital punishment from hanging to electrocution); *State v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984) (upholding amendment to statute which allowed defendant to elect either lethal injection or hanging as the method of punishment); *Woo Dak San v. State*, 7 P.2d 940, 941 (N.M. 1931) (upholding amendment to statute which changed method of capital punishment from hanging to electrocution); *Ex parte Granviel*, 561 S.W. 2d 503, 510-11 (Tex. Crim. App. 1978) (upholding amendment to statute which changed method of capital punishment from electrocution to lethal injection); *In re Personal Restraint of Benn*, 952 P.2d 116, 149 n.19 (Wash. 1998) ("Retroactive application of a change in the method of execution does not violate the Ex Post Facto Clause where the change is to a more humane method."). In *Malloy*, the Supreme Court concluded that "[t]he statute under consideration did not change the penalty-death-for murder, but only the mode of producing this. . . . The punishment was not increased. . . . " 237 U.S. at 185. In *Weaver v. Graham*, 450 U.S. 24, 33 n.17 (1981), the United States Supreme Court further explained its decision in *Malloy*, wherein the Court stated, "In *Malloy v. South Carolina*, we concluded that a change in the method of execution was not ex post facto because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective." (Citation omitted.) My research has not revealed a single state that has found the retroactive application of a more humane method of execution to be unconstitutional. This is true

even though the sentence imposed specifically called for the previous method of execution.

For all of the reasons expressed, I believe that the Legislature will only improve death penalty jurisprudence in Florida by amending our state's statute to permit inmates to choose between lethal injection and electrocution. This is the prudent and proper step for the Legislature to take.

LEWIS, J., concurs.

WELLS, J., concurring.

I concur in the majority opinion and the separate concurring opinion of Justice Quince. I write briefly to make two points.

First, the Davis nosebleed has not provided any basis for this Court to reexamine this issue. This Court, on July 8, 1999, sent this case to a trial judge because of allegations that the electric chair did not function as intended in the Davis execution. The trial judge made the factual determination that those allegations were unfounded. Therefore, there is no basis to disturb the decision that this Court so recently made in *Jones*.

Second, in respect to Chief Justice Harding's recommendation as to lethal injection, obviously the legislature can relieve further complications involved with the electric chair issues by changing the method of execution to lethal injection for those crimes committed after the effective date of the legislation. I join in the recommendation to that extent.

However, I have to acknowledge that there are legal issues with the changing of sentencing laws for the punishment of crimes committed prior to a change in the law. This Court has been repeatedly taught that lesson by the United States Supreme Court. In *Gomez v. Singletary*, 733 So. 2d 499 (Fla. 1998), the majority made this point, pointing to *Weaver v. Graham*, 450 U.S. 24 (1981), *Lynce v. Mathis*, 519 U.S. 433 (1997), *Calamia v. Singletary*, 117 S. Ct. 1309 (1997), and *State v. Lancaster*, 118 S. Ct. 37 (1997). A great number of prisoners presently on death row have been sentenced to death by judgments which specify use of the electric chair because their sentences conformed with the existing law. All have been sentenced on the basis of section 922.10, Florida Statutes, which states: "A death sentence shall be executed by electrocution."

Not only does this United States Supreme Court precedent present legal issues on a change of this Florida statute, the Florida Constitution presents a legal issue in article X, section 9, which states expressly: "Repeal or amendment of a criminal statute shall *not* affect prosecution or *punishment* for any crime previously committed." (Emphasis added.) Justice Shaw's dissent acknowledges this legal issue in its footnote 53, recognizing this Court's precedent in *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926), from which he states he would recede.

A change to lethal injection for inmates may be legally attainable based upon an express waiver by the prisoner of any contest as to the method of execution. However, such a change requires full study and awareness by the legislature of the legal issues. Consequently, I do not join those that recommend it without acknowledging the consequent legal issues and that those legal issues

will present matters for further litigation. I conclude that because of these outstanding legal issues the decisions as to this change are within the province of the legislature and are matters about which this Court cannot properly render an advisory opinion regardless of our personal views as to that decision.

QUINCE, J., concurs.

QUINCE, J., specially concurring.

I agree with the majority's determination that death by electrocution is not cruel and unusual punishment within the meaning of the Eighth Amendment. While there has been much said about the Davis execution because of the blood which dripped from the inmate's nostril during this process, the real question presented here is whether or not the use of electrocution violates the "evolving standards of decency" espoused by the United States Supreme Court in *Trop v. Dulles*, 356 U.S. 86 (1958). The answer to this question is not easy and involves the analysis of several factors including the use of the particular method by other states. Although electrocution as the judicial method of execution has been abandoned in a number of states in favor of, for the must part, lethal injection,[2] that factor does not dispose of the issue.[3]

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[2] This supposed more "humane" method of execution has come under Eighth Amendment attack and I suspect will generate even more litigation over the next few years. *See Hunt v. Smith*, 856 F. Supp. 251 (D. Md. 1994), *aff'd sub nom. Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995).

[3] Only one state, Utah, uses the firing squad as its method of judicial execution.

In *Jones v. State*, 701 So. 2d 76 (Fla. 1997), *cert. denied*, 118 S. Ct. 1297 (1998), this Court reiterated its prior determination that death by electrocution is not per se cruel and unusual punishment under the Eighth Amendment. *See also Medina v. State*, 690 So. 2d 1241 (Fla.), *cert. denied*, 117 S. Ct. 1330 (1997). And, citing to *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995), and *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), we indicated that the question of whether electrocution was unusual because it was used in only six states[4] was subsumed in the larger question of per se unconstitutionality. In *Hunt*, the court addressed the constitutionality of judicial execution by lethal gas[5] and, in *Campbell*, the court addressed judicial execution by hanging.[6]

In both cases the courts were asked to declare the methods of execution cruel and unusual because they were only used by a few states, and many states had abandoned the methods in favor of lethal injection.[7] In

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[4] The use of electrocution as the sole method of judicial execution is now used in only four states: Alabama, Georgia, Florida and Nebraska.

[5] Lethal gas as a judicial method of execution is provided for in several states, including: Missouri and North Carolina. Both Maryland and California have now changed to lethal injection as the method of execution.

[6] Hanging as a method of execution takes place in only Washington and Montana, and in both states, lethal injection can be chosen by the defendant.

[7] In *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995), the circuit court did not address, based on mootness grounds, the defendant's argument that execution by lethal injection violated the Eighth Amendment prohibition against cruel and unusual punishment because lethal injection violated federal drug laws

making the determination that neither lethal gas nor hanging was violative of the Eighth Amendment, the Ninth and Fourth Circuits looked to other objective factors when possible. In *Campbell*, the court stated:

> [M]ethodology review focuses more heavily on objective evidence of the pain involved in the challenged method. *See, e.g., Glass v. Louisiana*, 471 U.S. at 1084, 105 S. Ct. at 2162 (Brennan, J., dissenting) (noting that "[f]irst and foremost" among the "objective factors by which courts should evaluate the constitutionality of a challenged method of punishment" is whether the method involves " 'the unnecessary and wanton infliction of pain.' " (Citation omitted.)) The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.

Campbell, 18 F.3d at 682 (footnote omitted). In *Hunt*, the court made a similar observation in reference to the use of lethal gas when it opined:

> Despite the court's thorough opinion,[8] we decline Hunt's invitation to become the first court to follow the reasoning in *Fierro*. Lethal

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and could inflict cruel and inhumane treatment as a result of botched executions.

[8] The district court in *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994), *vacated sub nom. Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998), declared unconstitutional the California statute that required or permitted execution by lethal gas.

> gas currently may not be the most humane method of execution – assuming that there could be a humane method of execution – but the existence and adoption of more humane methods does not automatically render a contested method cruel and unusual. Before *Fierro*, a number of courts had held that execution by lethal gas did not violate the Eighth Amendment. Furthermore, we agree with the district court in Hunt's case that "graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain." *Hunt III*, 856 F. Supp. at 260; *see also Campbell*, 18 F.3d at 683.

Hunt, 57 F.3d at 1337-38 (citations omitted). Thus, both courts reject the notion that a method of execution is cruel and unusual because it is not a popular method.

Another objective criteria that the ninth circuit focused on was the role of the legislature in determining the appropriate punishment for crimes. The court in *Campbell*, quoting from *Gregg v. Georgia*, 428 U.S. 153 (1976), stated that a punishment selected by a duly elected legislature is presumed constitutional. This presumption holds true even if the legislature does not select the least severe penalty, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. The Court in *Gregg* said:

> [T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for

the Eighth Amendment is a restraint upon the exercise of legislative power.

> "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." *Furman v. Georgia*, 408 U.S., at 313-314 (White, J., concurring).

See also Id., at 433 (Powell, J., dissenting).

Gregg, 428 U.S. at 174. In evaluating the constitutionality of legislative action, the judiciary should not be swayed by its own individual notion of whether or not the particular judge would have chosen another course. Courts should instead give effect to the legislative enactment as a reflection of the will and the moral values of the people. However, while the laws and statutes enacted by the people's duly elected representatives are some evidence of contemporary values, again this is not determinative.

When drafting the Eighth Amendment, the framers of our constitution were primarily concerned with proscribing torturous or barbarous punishments. *See Furman v. Georgia*, 408 U.S. 238 (1972). As a consequence, the primary objective factor, in addition to legislative action, that bears on the issue of the constitutionality of a particular method of execution is whether or not that method involves the "unnecessary and wanton infliction of pain."

On that issue, in regards to the execution of Allen Lee Davis, the trial court found:

> Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.
>
> The nose bleed incurred by Allen Lee Davis began before the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.
>
> The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

The trial court's findings are based on substantial competent evidence that was adduced at the evidentiary hearing and must be upheld. *See Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982). These findings support the trial court's ultimate conclusion that electrocution as a form of execution does not constitute cruel and unusual punishment.

In my estimation, little has changed since our analysis of this situation in *Jones v. State*. The pictures of the

blood generated by Davis's nosebleed are not pleasant. However, we must keep in mind that the nosebleed does not per se relate to the proper functioning of the electric chair. The two issues are not, under the circumstances of this case, intertwined.

I join in the trial court's suggestion to the Department of Corrections that the mouth strap should be replaced or other sizes used depending on the size of the inmate. Such a change, assuming the bleeding and the facial discoloration resulted from the placement of the mouth strap, should eliminate some of the "ghastliness" associated with the photographs of the Davis body, and eliminate some of the human error that seems to plague this form of execution.

For the reasons stated above, I would affirm the trial court's determination that Florida's use of electrocution as the sole method of execution is not cruel and unusual punishment.

WELLS, J., concurs.

SHAW, J., dissenting.

The overarching question presented in this case is whether continued use of electrocution as the official method of execution in Florida comports with the state and federal constitutions. This question has *not* been directly confronted by this Court in any case – despite a widespread belief that the issue has been duly decided. At most, this Court on one occasion has conducted a "snapshot" review of the execution apparatus, i.e., the electric chair, and concluded that use of the chair *at that point in time* did not violate the constitution because any

problems had been fixed and inmates suffered no conscious pain.[9] The Court did not address violence or mutilation or the per se constitutionality of electrocution as a mode of execution in Florida. That issue was procedurally barred:

> The claim that execution by electrocution is unconstitutional per se is hereby denied as *procedurally barred* as it could have been raised in previous petitions for relief.

Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997) (emphasis added).

In light of continuing malfunctions and mishaps with this method of execution in Florida, I am convinced that the time has now come to confront this issue head-on, and it is my conclusion that electrocution as it has been administered in Florida is unconstitutional. I would direct that the sentence in the present case be carried out by lethal injection as prescribed by statute.[10]

I. FACTS

Following the recent bloody execution of Allen Lee Davis on July 8, 1999, this Court remanded the present case to the trial court to conduct an evidentiary hearing on a single narrow issue – the present functioning of Florida's electric chair. At the conclusion of the hearing,

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[9] *See Jones v. State*, 701 So. 2d 76 (Fla.1997), *cert. denied*, 118 S. Ct. 1297 (1998).

[10] *See* § 922.105(1), Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

the trial court *inter alia* made two findings despite considerable evidence to the contrary: (1) Florida's electric chair functioned as intended during the Davis execution; and (2) Davis suffered no conscious pain. The court ruled as follows:

> Execution by electrocution in Florida's electric chair as it exists *in its present condition* as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

(Emphasis added.) The court focused only on the question before it and did not address the issues of violence or mutilation or the overall record of electrocution as a method of execution in Florida.

The present majority opinion affirms the conclusion of the trial court, focusing on the present functioning of the chair and the lack of pain:

> This Court recently concluded in *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or lingering death' or the infliction of 'unnecessary and wanton pain.' " (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)). The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.

Majority op. at 4. The majority opinion then proceeds to extrapolate from the narrow "snapshot" ruling of the trial court and concludes broadly that use of Florida's electric chair *in general* is not cruel or unusual punishment, citing *Jones v. State*, 701 So. 2d 76 (Fla. 1997):

> In *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), this Court stated, "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " We find that the circuit court's findings of fact are supported by competent substantial evidence. Therefore, *we again conclude, as we did in Jones, that Florida's electric chair is not cruel or unusual punishment.*

Majority op. at 4-5 (emphasis added). The majority opinion summarily rejects Provenzano's "evolving standards of decency" claim, again citing *Jones:*

> In issue two, Provenzano claims that Florida's current use of electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. *This claim was rejected by this court in Jones. See* 701 So. 2d at 79.

Majority op. at 5 (emphasis added).

This reliance on *Jones* is misplaced. Contrary to what the majority opinion assumes, the trial courts both in *Jones* and the present case never reached the broad issue of the per se constitutionality of electrocution as a method of execution in Florida – that issue was beyond

the scope of the evidentiary hearings in both cases. Nor did this Court in *Jones* address this issue – for the issue was found to be procedurally barred.

II. FLORIDA'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

Article I, section 17, Florida Constitution, proscribes punishments that are "cruel and unusual":

> SECTION 17. Excessive punishments. – Excessive fines, *cruel and unusual punishment*, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses *are forbidden*.

Art. I, § 17, Fla. Const. (emphasis added). The question posed in the present case is whether this prohibition bars the use of electrocution as the official method of execution in Florida.

The present majority opinion relies on *Jones v. State*, 701 So. 2d 76 (Fla. 1997), to resolve this issue. Following the fiery execution of Pedro Medina in 1997, this Court remanded Jones' case to the trial court to conduct an evidentiary hearing on the limited issue of whether use of Florida's electric chair in its then-current condition constituted "cruel or unusual" punishment. *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997). The trial court found that the malfunction (an improperly moistened sponge in the head-piece) had been fixed, that the chair was now working properly, and that Medina had suffered no conscious pain. This Court affirmed.

This Court refused to consider Jones' contention that electrocution in general is unconstitutional under evolving standards of decency. The Court explained:

> Jones also argues that the trial judge erred in refusing to admit and consider evidence that execution in Florida is unusual because there is a trend away from execution through the use of the electric chair as a means of capital punishment and because only six states currently employ the electric chair as a means of execution. *The trial judge properly excluded this evidence as being beyond the scope of the issue which he had been assigned to decide. Our previous ruling that execution by the use of the electric chair is not per se unconstitutional subsumed the argument that Jones now makes. See Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994) ("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."); *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) ("[T]he existence and adoption of more humane methods [of execution] does not automatically render a contested method cruel and unusual.").

Jones, 701 So. 2d at 79 (emphasis added) (footnote omitted). The Court ultimately held as follows: "We hold that electrocution in Florida's electric chair *in its present condition* is not cruel or unusual punishment." *Id.* at 80 (emphasis added).

It is clear from the above that this Court – and the trial court – did not address the issue of whether Medina suffered undue violence or mutilation or whether electrocution is constitutional as the traditional method of execution in Florida. Rather, the Court conducted a

"snapshot" review of the current functioning of Florida's electric chair – i.e., the Court limited its review to whether the electric chair was working properly *at that point in time* and whether Medina had suffered unnecessary pain. The Court disposed of Jones' per se constitutionality claim by referring to its earlier ruling in the case. ("Our previous ruling that execution by the use of the electric chair is not per se unconstitutional subsumed the [evolving standards of decency] argument that Jones now makes." *Id.*) A review of that earlier ruling, however, shows that *the Court never addressed the per se constitutionality issue on the merits but rather disposed of it procedurally.*[11] Nowhere in our two decisions in Leo Jones' case did the Court directly address this issue; it was never properly before the Court.

A review of this Court's death penalty precedent reveals that in those cases in which this issue was raised, the Court disposed of the matter in summary fashion without analysis.[12] The State points to no case from this

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[11] *See Jones v. Butterworth*, 691 So. 2d 481, 482 (Fla. 1997) ("The claim that execution by electrocution is unconstitutional per se is hereby denied as *procedurally barred* as it could have been raised in previous petitions for relief." (Emphasis added.)).

[12] *See, e.g., White v. State*, 729 So. 2d 909, 911 & n.4 (Fla. 1999) (rejecting the constitutionality issue "as without merit"); *Remeta v. State*, 710 So. 2d 543, 546 (Fla.) (stating that defendant was entitled to "no relief" on the constitutionality issue), *cert. denied*, 118 S. Ct. 1383 (1998); *Elledge v. State*, 706 So. 2d 1340, 1347 & n.9 (Fla. 1997) (stating that the constitutionality issue had "already been decided adversely to Elledge"), *cert. denied*, 119 So. 2d 366 (1998); *Pooler v. State*, 704 So. 2d 1375, 1381 (Fla. 1997) (noting that the claim had been "previously rejected . . . as meritless"), *cert. denied*, 119 S.Ct. 119 (1998); *Hoskins v. State*, 702

Court where this method of execution was subjected to explicit constitutional scrutiny. Existing Florida precedent construing the Cruel and Unusual Punishment Clause in other situations offers little insight. Accordingly, this Court is obliged to turn to United States Supreme Court precedent for guidance.

III. FEDERAL CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Eighth Amendment to the United States Constitution bars punishments that are "cruel and unusual":

> Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

U.S. Const. amend. VIII (emphasis added). This provision is of key importance in evaluating the lawfulness of a method of execution.

So. 2d 202, 208 (Fla. 1997) (rejecting the claim as "without merit" and noting the claim had been "repeatedly rejected" by this Court); *Consalvo v. State*, 697 So. 2d 805, 811-12 (Fla. 1996) (noting that the claim had been "previously rejected by this Court and do[es] not require additional discussion"), *cert. denied*, 118 S.Ct. 1681 (1998); *Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995) (ruling that the issue was procedurally barred, but even if not barred the issue had been rejected previously); *Fotopoulos v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992) (finding that the claim was procedurally barred, but even if not barred the claim "lack[ed] merit").

A. The *Kemmler* Standard – "Mere Extinguishment of Life"

The United States Supreme Court last confronted a "method of execution" case in *In re Kemmler*, 136 U.S. 436 (1890), the case that inaugurated electrocution as a method of execution in this country.[13] That case is still the seminal case in this field and, contrary to popular belief, does not stand for the proposition that electrocution is per se lawful *ad infinitum* if there is no pain.[14] Rather, the Court in *Kemmler* simply acceded to the state court's finding that – given the available options at that point in time in the nineteenth century – electrocution was permissible as a more humane form of execution than hanging. As explained below, the enduring legal principle articulated in that case – i.e., the *Kemmler* standard – is far more broad and goes to the very heart of the Eighth Amendment.

The Court in *In re Kemmler*, 136 U.S. 436 (1890), was asked to invalidate New York's newly enacted statutory scheme, which replaced hanging with electrocution as the

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[13] Prior to *Kemmler*, the United States Supreme Court addressed (with approval) shooting as a method of execution in the Territory of Utah. *See Wilkerson v. Utah*, 99 U.S. 130 (1878).

[14] *See generally Poyner v. Murray*, 508 U.S. 931, 933 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., dissenting from denial of certiorari) ("The Court has not spoken squarely on the underlying issue since *In re Kemmler*, and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question."). I note that *Kemmler* was decided on a limited evidentiary basis – no one had yet been executed by electrocution.

official method of execution. The Court declined to invalidate the statute. First, the Court noted that death by hanging had been recognized by the governor of New York to be barbaric, and that the governor had called upon the state legislature to find a better method:

> It appears that the first step which led to the enactment of the law was a statement contained in the annual message of the governor of the State of New York, transmitted to the legislature January 6, 1885, as follows: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature."

Id. at 444. Second, the Court pointed out that the state legislature had acted faithfully on the governor's commendation:

> The legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the Laws of 1888.

Id. And finally, the Court noted that: (a) the state legislature had determined that electrocution was a more humane method of punishment; (b) the trial court had collected a "voluminous mass of evidence" on both sides of the issue and had reached the same conclusion, and (c)

the state courts at every level had agreed with that conclusion.

In addressing the Cruel and Unusual Punishments Clause in this context,[15] the United States Supreme Court set forth what has become known as the *Kemmler* standard. That standard, which bars anything more than "the mere extinguishment of life," is now the abiding criterion for evaluating the constitutionality of a method of execution:

> Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. *[Cruelty] implies . . . something inhuman and barbarous, – something more than the mere extinguishment of life.*

Id. at 447 (emphasis added). In short, to comport with the constitution, a method of execution is limited to "the mere extinguishment of life" – to the extent that this is reasonably possible. Any adverse effect beyond that point (i.e., any undue pain, violence, mutilation, or disgrace) is gratuitous and thus "inhuman and barbarous." The Court ultimately deferred to the state legislature's and courts' determination that electrocution was a more humane method of execution than hanging and declined to invalidate the New York statute. *Id.* at 449.

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[15] The Cruel and Unusual Punishments Clause was inapplicable to the states at that time. *See Kemmler*, 136 U.S. at 446. *See also Robinson v. California*, 370 U.S. 660 (1962) (extending the Eighth Amendment to the states via the Fourteenth Amendment).

Although the United States Supreme Court has not confronted a "method of execution" case since *Kemmler*, the Court has ruled on a number of other government practices under the Cruel and Unusual Punishments Clause, as explained below. The *Kemmler* standard is reaffirmed in many of these cases. In reviewing these cases, a broad schematic for construing the Clause in "method of execution" cases emerges, embracing the following points: (1) While pain is a relevant indicator of cruelty, it is not the only indicator; (2) violence, mutilation, and disgrace are also relevant indicators of cruelty; and (3) the legal dimensions of cruelty are measurable against evolving standards of decency.

1. Undue Pain

In the olden days, a common component of punishments meted out by the crown was the intentional infliction of pain, violence, mutilation, and disgrace, for the crown viewed wanton cruelty as both a deterrent and a mode of vengeance and retribution. Upon our nation's birth, however, the Cruel and Unusual Punishments Clause was erected by the founding fathers as a resolute barrier to this repugnant practice, particularly where methods of execution were concerned.[16] While some

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[16] Justice Brennan addressed this issue in *Glass v. Louisiana*, 471 U.S. 1080 (1985), reaffirming the *Kemmler* standard:

> The Court has *never* accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life. Thus in explaining the

degree of suffering is unavoidable in any means of taking life, the Clause focuses on any excessive cruelty which inheres in the method of execution – not that inevitable suffering which exists in the mind of the condemned.[17]

To meet the requirement that a punishment not be impermissibly cruel, a method of execution first of all must inflict no undue pain. As the United States Supreme Court stated: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 463.

> obvious unconstitutionality of such ancient practices as disembowelling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel, the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace."

Glass, 471 U.S. at 1084 (Brennan, J., dissenting from denial of certiorari) (citation and footnote omitted); *See also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) ("[T]he punishment must not involve the unnecessary and wanton infliction of pain.").

[17] *See generally Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.").

> The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death it self.

Id. at 474 (Burton, J., dissenting).

California's gas chamber has been found to be impermissibly cruel under this test, for while lethal gas as applied in California involves minimal violence and mutilation, it inflicts substantial pain (i.e., intense visceral pain from oxygen deprivation) and results in a slow, lingering death akin to artificial drowning (i.e., the inmate may remain conscious for several minutes) and thus is cruel in its effect.[18] Execution by gas is to be

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[18] The United States Court of Appeals, Ninth Circuit, described the effects of lethal gas as applied in California:

> [I]nmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. . . . [A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, . . . inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

Fierro v. Gomez, 77 F.3d 301, 308 (9th Cir.) (quoting *Fierro v. Gomez*, 865 F.Supp. 1387, 1404 (N.D.Cal.1994)), *vacated and*

distinguished from lethal injection, which is generally considered more humane.[19]

2. Undue Violence, Mutilation, and Disgrace

Although pain is an important indicator of cruelty, it is not the only indicator – for a method of execution can involve minimal pain and yet still be extraordinarily cruel. To meet the requirement that a punishment not be impermissibly cruel, a method of execution also must entail no undue violence, mutilation, or disgrace:

> The Eighth Amendment's protection of "the dignity of man" extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body.

Glass, 471 U.S. at 1085 (Brennan, J., dissenting from denial of certiorari).[20]

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remanded for reconsideration, 519 U.S. 918 (1996), *remanded*, *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

[19] *See generally* Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. Miami L.Rev. 445, 465 (1997) ("By most accounts, lethal injection involves minimal pain, and there is little apparent violence or bodily mutilation.").

[20] *See also Campbell v. Wood*, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[P]ainless,

As conceded by the State in the present proceeding, the guillotine as used in the French Revolution is a prime example of a method that would fail in this regard, for while beheading results in a quick, relatively painless death,[21] it entails frank violence (i.e., gross laceration and blood-letting) and mutilation (i.e., decapitation) and disgrace (i.e., public spectacle) and thus is facially cruel. Post-execution disfigurement – e.g., dismemberment, disembowelment, decapitation, flaying, or dragging of the body – and displaying of the mutilated corpse similarly would be forbidden even though this practice involves no conscious pain. Forced public disrobing prior to execution also would be forbidden.

In the present case, the State in oral argument before this Court conceded that use of the guillotine as a method of execution would fail constitutional muster in all states under the Cruel and Unusual Punishments Clause. By this concession, the State – of necessity – agrees that there

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post mortem punishments such as public display, drawing and quartering, and mutilation also violate the Eighth Amendment."); *Rupe v. Wood*, 863 F. Supp. 1307, 1315 (W.D. Wash. 1994) ("Supreme Court cases discussing the history of the Eighth Amendment make clear that decapitation and similar mutilation, even if accomplished after death and thus perhaps without 'unnecessary and wanton infliction of pain,' offend basic human dignity."); *Thomas v. Jones*, 742 F. Supp. 598, 603 (S.D. Ala. 1990) ("Every case the Court reviewed dealing with electrocution acknowledged that painful electrocution, *or* excessive burning and mutilation might violate the Eighth Amendment." (Emphasis added.)).

[21] *See generally* Robert J. Sech, Note, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 Val. U.L.Rev. 381 (1995).

are other indicators of cruelty besides pain. I suggest that these additional indicators inhere in the method of execution. Thus far in Florida, we have suppressed any reasoned consideration of these additional factors by limiting the scope of the inquiry at the evidentiary hearings, wherein the courts have focused only on pain.

B. Evolving Standards of Decency

Subsequent to its decision in *Kemmler*, the United States Supreme Court concluded that the Constitution – in order to retain meaning and effect – must exist in our society as a dynamic force.[22] The Court then articulated a new standard for evaluating certain government practices under the Cruel and Unusual Punishments Clause – the "evolving standards of decency" criterion:

> The Court [has] recognized . . . that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*

Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (emphasis added).[23] The Supreme Court has reviewed a number of government practices under this standard, including the

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[22] *See Weems v. United States*, 217 U.S. 349, 373 (1910) ("In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.").

[23] The Court in *Trop* held that forced relinquishment of citizenship as punishment for misconduct while in the military violates the Eighth Amendment.

imposition of the death penalty for various offenses.[24] This review generally includes three considerations: (1) Whether the practice has been approved, rejected, or abandoned in other states;[25] (2) whether the practice has been approved, rejected, or abandoned by the governments of other civilized nations;[26] and (3) whether other less cruel modes of punishment are available.[27]

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[24] *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that it is not cruel and unusual to execute the mentally retarded); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that it is cruel and unusual to execute the insane); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding the death penalty disproportionately cruel and unusual when imposed for aiding and abetting a robbery resulting in murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty disproportionately cruel and unusual when imposed for the crime of rape).

[25] *See, e.g., Coker.*

[26] *See, e.g., Trop.*

[27] Justice Powell noted the following in *Furman v. Georgia*, 408 U.S. 238 (1972):

> Neither the Congress nor any state legislature would today tolerate pilloryings, branding, or cropping or nailing of the ears – punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution. Likewise, *no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.*

Id., 408 U.S. at 430 (Powell, J., dissenting) (citation and footnote omitted) (emphasis added). Justice Powell's views in *Furman* were largely adopted by the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).

C. Analysis Used by Lower Federal Courts

Unlike the United States Supreme Court, the lower federal courts have ruled on the constitutionality of several methods of execution in recent years. The analytical model that emerges from these rulings has two steps. The court first determines whether a method of execution is limited to "the mere extinguishment of life." If the method is not so limited and entails adverse effects beyond that point, the court then must determine if these effects are "undue." To assist in this second step, the court may apply the "evolving standards of decency" criterion. Two federal circuit court cases are instructive.[28]

The Ninth Circuit in *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994), upheld the State of Washington's alternative method of execution,[29] hanging, against a challenge under the Cruel and Unusual Punishments Clause.[30]

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[28] In two additional cases, the federal circuit court reviewed a method of execution but did not conduct an in-depth constitutional analysis. In both cases, there had been no evidentiary hearing below, and the circuit court deferred to precedent approving the method under review. *See Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995) (upholding lethal gas in Maryland); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983) (upholding lethal gas in Mississippi).

[29] Under the Washington scheme at that time, a defendant could choose the method of execution, either hanging or lethal injection, with the default falling to hanging. *See* Wash. Rev. Code 10.95.180(1) (1994). This statute was later amended to allow the default to fall to lethal injection. *See* Wash. Rev. Code 10.95.180(1) (1994).

[30] *But see Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994) (holding that execution by hanging under the Washington protocol presented a substantial risk of decapitation for Rupe,

After conducting an evidentiary hearing on the issue, the trial court noted two points: (1) Hanging in Washington is conducted pursuant to "Field Instruction WSP 410.500," an exhaustively detailed execution protocol adopted from the military; and (2) after adoption of the protocol, the only hanging conducted in the state had been performed flawlessly several years earlier.[31] *Campbell*, 18 F.3d at 683, 685. The trial court then concluded that "hanging according to the protocol does not involve lingering death, mutilation, or the unnecessary and wanton infliction of pain." *Id.* at 687. The circuit court deferred to the trial court's findings and declined to conduct an "evolving standards of decency" analysis. *Id.* at 682. There was no point in looking at other states; execution by hanging as carried out in Washington *clearly* entailed no undue pain or mutilation.[32]

Two years later, the Ninth Circuit in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), held California's alternative

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who was obese, and thus violated the Cruel and Unusual Punishments Clause). The district court's decision in *Rupe* was vacated on appeal after the Washington Legislature amended the statute (which offered a choice of method – hanging or lethal injection – with the default falling to hanging) to allow the default to fall to lethal injection. *See Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996).

[31] Westley Allan Dodd was the only person to be executed by hanging in the United States since 1963. *See Campbell*, 18 F.3d at 700 (Reinhardt, J., dissenting).

[32] *But see Campbell v. Wood*, 511 U.S. 1119, 1120-21 (1994) (Blackmun, J., dissenting) (contending that the Ninth Circuit should have conducted an analysis under the "evolving standards of decency" criterion).

method of execution,[33] lethal gas, unconstitutional. The trial court had conducted an eight-day bench trial on the issue and concluded that lethal gas as applied in California resulted in extreme physical pain. The circuit court again deferred to the trial court's findings and declined to conduct an "evolving standards of decency" analysis. *Id.* at 308. There was no point in looking at other states; execution by lethal gas as carried out in California *clearly* entailed undue pain.

Although the Ninth Circuit in both *Campbell* and *Fiero* declined to apply the "evolving standards of decency" criterion, this was due to the particular facts of those cases. In the eyes of the court, the proper result in each case was clear-cut and was dictated by circumstances in the home state. The court did *not* hold that the "evolving standards of decency" criterion could never be used in a "method of execution" case – for logic suggests that the criterion would be helpful in a case where the constitutionality *vel non* of the method is not clear-cut (which is the situation in the present case).

IV. THREE RECENT EXECUTIONS

The administration of electrocution in Florida demonstrates the cruelty inherent in this method of execution. Not only was every execution in Florida accompanied by

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[33] Under the California scheme at that time, a defendant could choose the method of execution, either lethal gas or injection, with the default falling to lethal gas. Cal. Penal Code § 3604(b) (West Supp. 1995). This statute was later amended to allow the default to fall to lethal injection. Cal. Penal Code § 3604(b) (West Supp. 1996).

the inevitable convulsing and burning that characterizes electrocution,[34] but further, three executions in particular were marred by extraordinary violence and mutilation. In two of these executions, smoke and flames spurted from the headpiece and burned the heads and faces of the inmates. In the third execution, the inmate bled from the nostrils and was at least partially asphyxiated by the restraining devices; and he too was burned.

A. Tafero's Execution

Florida's electric chair malfunctioned during the execution of Jesse Tafero on May 4, 1990, resulting in a violent scene, with smoke and foot-long flames spurting from his head. This Court described the scene:

> When Tafero's execution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches. The flames and smoke emanated from the area around a metallic skull cap, inside of which was a saline-soaked synthetic sponge meant to increase the flow of electricity to the head. The cap is the source of electricity administered to condemned prisoners by the electric chair.
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> Because of the smoke and flames, officials of the Department of Corrections stopped the first surge of electricity. A second jolt again resulted in smoke and flames spurting from Tafero's head. Finally, a third jolt of electricity was administered. A medical examiner found that

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[34] *See generally Jones*, 701 So. 2d at 82-88 (Shaw, J., dissenting).

> Tafero was dead some six or seven minutes after the execution commenced.
>
> Thereafter, the Governor ordered the Department of Corrections to conduct an investigation into the circumstances of Tafero's execution. The Department reported that the equipment was in proper working order. However, it was determined that for the first time a synthetic, rather than a natural, sponge had been used in the headpiece. The Department concluded that the burning of the sponge caused the flames and smoke which were seen during Tafero's execution. . . . The Department . . . noted that most executions last longer than seven minutes.

Buenoano v. State, 565 So.2d 309, 310-11 (Fla.1990).

The mutilated condition of Tafero's body was described in the sworn statement of a witness:

> I have seen the bodies of three other inmates executed by officials of the Florida State Prison. I saw them at approximately the same length of time after they were executed as I saw Mr. Tafero's body. None of the other bodies I saw before had the severe burning and scorching and damage to the head as did Mr. Tafero's. None had any marks on the face at all.
>
> The entire top of Mr. Tafero's head is covered with wounds. There is one dominant charred area and a myriad of smaller gouged, raw areas to the upper right side and lower right of the large burned area.
>
> The dominant charred area is on the top left side of the head. It is larger than my hand. . . . The funeral director said that this was a third

> degree burn. The rest of that area was a dark brownish color, slightly lighter than the charred area. The funeral director said that this would be a second degree burn.

Id. at 314 (Kogan, J., dissenting). Additionally, Tafero's eyebrows, eyelashes, and facial hair were burned when flames licked his face. *See Jones*, 701 So. 2d at 87 (Shaw, J., dissenting).

B. Medina's Execution

Florida's electric chair malfunctioned again during the execution of Pedro Medina on March 25, 1997, resulting in another violent scene with smoke and flames spurting from the head-piece. Unlike Tafero, Medina's eyebrows, eyelashes, and facial hair were not burned off. However, Medina's head was charred and his face was scalded. The trial court in Jones described the execution:

> When Pedro Medina was executed on March 25, 1997, the following events occurred. When the electrical current was activated, within seconds . . . smoke emanated from under the right side of Medina's head piece, followed by a 4 to 5 inch yellow-orange flame which lasted 4 to 5 seconds and then disappeared. After the flame went out, more smoke emanated from under the head piece to the extent that the death chamber was filled with smoke – but the smoke was not dense enough to impair visibility in or through the chamber. The smoke continued until the electrical current was shut off in the middle of the third cycle. Although several witnesses to the execution tried to describe the odor of the smoke, only one witness, Florida State Prison Superintendent Ronald McAndrews,

> described the odor as burnt sponge. . . . This Court finds that the odor smelled was burnt sponge, not burnt flesh.
>
> The physician's assistant, William Mathews, examined Medina's body. At that time, Medina was not breathing or exchanging air through his nostrils; his pupils were fixed and dilated; and he had an agonal pulse and heart sounds. When the physician's assistant was no longer able to detect any pulse or heart sounds, the attending physician, Dr. Almojera, examined Medina and pronounced him dead at 7:10 a.m. During Dr. Almojera's last examination Medina's chest was seen to move two or three times in a two to four minute period. A couple of witnesses thought Medina was trying to breathe. Several witnesses did not describe it as attempted breathing, but as a lurching, spasmodic movement, a shudder, and outward not upward movement. No witness, particularly those closest to Medina, could state that he was in fact breathing or attempting to breathe.

Jones, 701 So. 2d at 86 (Shaw, J., dissenting).

As with Tafero's body, Medina's body also was mutilated by the electrocution. The findings of the pathologists who conducted the autopsy of Medina were summarized by the trial court in Jones:

> 1. The head had a "burn ring" on the crown of the head that was common in executions by judicial electrocution.
>
> 2. Within the "burn ring" there was a third degree burn on the crown of the head, with deposits of charred material. . . .

> 3. There was a first degree burn of the upper front face and head, caused by scalding steam. . . . Unlike the Tafero execution, Medina had no burning of the eyebrows, eyelashes, or small hairs of the face that would have resulted if the burning had been the result of a flame rather than steam.

Jones, 701 So. 2d at 86-87 (Shaw, J., dissenting).

C. Davis' Execution

The execution of Allen Lee Davis on July 8, 1999, differed from prior executions in that here Department of Corrections ("DOC") officials took post-execution color photos of Davis before he was removed from the electric chair. (Several of the photos are appended to this dissenting opinion.) These photos, when combined with eye witness accounts, provide a vivid picture of a violent scene. According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide – approximately five inches from top to bottom – and it covered the entire lower portion of Davis's face from the bottom of his chin to immediately below his nose.[35] The strap was fastened so tightly against his face and was so wide that it pushed his nose severely upward, blocking his nostrils at least partially. A

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[35] The "mouth-strap" in fact appears to be a weight-lifter's belt or some such item. In the photos, the belt is turned backwards, so that the wide portion, which normally would support the back of the weight lifter, is placed over Davis' face. The belt is then run behind two wood rails at the back of the electric chair and buckled behind the chair.

heavy fabric face-mask was placed on top of this apparatus, further occluding his airway. And then, as explained below, blood began flowing from his nose prior to electrocution. This too obstructed his nostrils.

The trial court below explained that the pathologist who conducted a post-execution autopsy on Davis concluded that he had been at least partially asphyxiated prior to electrocution:

> Robert Kirschner, M.D., forensic pathologist from Illinois, testified as an expert in the area of forensic pathology. Kirschner testified that he performed an autopsy on the body of Allen Lee Davis. He testified that during Davis's autopsy, he was unable to identify the precise source of the nose bleed that Davis suffered, but that it was coming from the septal area of the left nostril. *Kirschner testified that the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of electrical current to him. Kirschner testified that he is of the opinion that Davis' death was caused by electrocution and association of partial asphyxiation which occurred before the electrocution.* . . .
>
> . . . .
>
> Aubrey D. Thornton, Assistant Warden at Florida State Prison, testified that he was one of the individuals responsible for strapping Allen Lee Davis into the electric chair. . . . *Thornton also testified that Davis' face began to turn red after the mouth strap was applied to him.* . . .

(Emphasis added.) After Davis' airflow had been blocked by the mouth-strap, the face-mask, and his own blood,

Davis made several sounds under the face-mask which were described variously as muffled screams, moans, or yells, as if he were attempting to get the guards' attention. The trial court gave the following description:

> John W. Moser, Capital Collateral Regional Counsel for the Middle Region, testified that in his capacity as Capital Collateral Regional Counsel, he witnessed the execution of Allen Lee Davis. Moser testified that between the time Davis was secured in the electric-chair and the time the electrical current was applied to Davis, *he heard what sounded like two screams from Davis.* . . .
>
> Mark Lazarus, Victim Assistance Administrator for the Florida Department of Corrections, testified that he observed the execution of Allen Lee Davis. Lazarus testified that after the head piece was placed on Davis' head, *he heard two one-syllable sounds coming from Davis and that the sounds sounded like Davis was trying to "make some noise" or "yell out."* . . .
>
> . . . .
>
> Thomas Varnes, Warden at Wakulla Correctional Institution, testified that he witnessed the execution of Allen Lee Davis. Varnes testified that after the mouth strap and chin strap of the head piece were tightened and the face mask was lowered, *he heard Davis moan like he was trying to say something.* . . .
>
> . . . .
>
> James Crosby, Warden of Florida State Prison testified that after the mouth piece was placed on Davis, and just before the execution,

> *he heard two muffled sounds from Davis, which sounded like Davis was trying to say something.*

(Emphasis added.)

Prior to and during the electrocution, blood flowed freely from Davis' nose, ran over the mouth-strap, and spilled onto his chest, forming a pool the size of a dinner plate on his white shirt. Again, in the words of the trial court below:

> Sheila McAllister, Correctional Probation Officer at Wakulla Correctional Institution, testified that she witnessed the execution of Allen Lee Davis. . . . McAllister also testified that while the current was on *she observed blood on Davis' chest, and she observed something dripping from behind Davis' mask.*
>
> . . . .
>
> Michael R. Collins, employed with Florida State Prison as a nurse, testified that he attended the execution of Allen Lee Davis. . . . Collins further testified that after the electrical current was stopped and after Mr. Matthews, the Florida State Prison physician's assistant, was examining Davis, *he observed blood on Davis' shirt in his chest area and on his upper right side, by his collar. Collins stated that the blood was dripping from under the mask.* . . .
>
> . . . .
>
> William Muse, Lieutenant with the Florida Department of Corrections, assigned to Florida State Prison, testified that he witnessed the execution of Allen Lee Davis. . . . Muse testified

> that after the cycle of current had been terminated, *he observed blood on Davis' shirt, blood on the strap, and blood coming from Davis' nostril[s].*

(Emphasis added.) In light of the placement of the mouth-strap, the positioning of the face-mask, and the flow of blood from his nostrils, it is reasonable to conclude – as did Dr. Kirschner – that Davis was being smothered before he was electrocuted.

And finally, as with Tafero and Medina, Davis' body was mutilated by burns on the head, face, and leg, as noted in the trial court's order:

> The deposition of William Hamilton, M.D., Medical Examiner for the Eighth Judicial Circuit, was read into the record due to Hamilton's unavailability. . . . Hamilton testified that *Davis had burns on his scalp and forehead, on his superpubic and right upper medial thigh region, and behind the right knee.*

(Emphasis added.)

The color photos taken by DOC show a ghastly post-execution scene: Davis is wearing a white shirt and dark pants and is restrained in the wooden chair by thick leather straps placed across his arms, legs, torso, and mouth; the electrical head-piece is attached to the top of his head with a leather strap that runs under his chin; a sponge placed under the head-piece obscures the entire top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is

barely visible above the mouth-strap; although the exterior openings of Davis' nostrils are partially visible, it appears as though the interior openings may be covered by the mouth-strap; a stream of blood pours from his nostrils, flows over the wide leather mouth-strap, runs down his neck and chest, and forms a bright red pool (approximately eight by twelve inches) on his white shirt. The scene is unquestionably violent.

V. ELECTROCUTION IN FLORIDA IS UNCONSTITUTIONALLY CRUEL

As noted above, the abiding standard for determining the constitutionality of a method of execution is the "mere extinguishment of life" standard set forth in *In re Kemmler*, 136 U.S. 436 (1890). Execution by electrocution as administered in Florida violates this standard because it entails undue violence and mutilation. Additionally, execution by electrocution as practiced in Florida is inconsistent with evolving standards of decency.

A. Electrocution Violates the *Kemmler* Standard

Although a total of twenty executions were carried out "successfully" in the intervening years between the Tafero, Medina, and Davis executions, this statistic is insufficient to save Florida's method of execution from constitutional infirmity. In even the "successful" executions, the inmate was subjected to violence (i.e., the inmate was administered an electrical force that caused him to convulse violently) and mutilation (i.e., the body of each inmate was burned on the head and leg as a result

of the electrocution process). Additionally, in three out of twenty-three executions, i.e., *in thirteen percent of executions*, the prisoner was subjected to extreme violence and mutilation when the execution was botched.[36]

In two of these botched executions (Tafero and Medina), the prisoner was engulfed in smoke and flames when the switch was pulled. The head of one prisoner (Tafero) was burned and charred, his face was licked by flames, and his eyebrows, eyelashes, and facial hair were burned; his head also was gouged and made raw with wounds. The head of another (Medina) was burned and charred and his face was scalded. In the third botched execution (Davis), the prisoner suffered blood flowing from his nose and pooling on his chest; he was likely asphyxiated at least partially prior to electrocution, and he attempted to scream or yell after his airway was occluded; he too was burned on his head, face, and leg.

Each of the botched executions was sufficiently egregious to halt further executions and to prompt an extensive official inquiry, complete with an evidentiary hearing and voluminous testimony by eye witnesses and experts. Each botched execution also was transformed by the media into a world-wide spectacle, telecommunicated throughout the world in lurid and inflammatory detail.

Following the Tafero execution, the federal district court in Florida addressed the issue of repeated mishaps:

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[36] *See Thomas v. Jones*, 742 F. Supp. 598, 603 (S.D. Ala. 1990) (acknowledging that excessive burning and mutilation during electrocution would implicate the Eighth Amendment).

> If a pattern of malfunctions develops, perhaps even as few as two consecutive or nearly consecutive executions, then it may become appropriate to consider whether the application of electrocution in Florida is infected with "an element of cruelty."

Hamblen v. Dugger, 748 F. Supp. 1498, 1504 (M.D. Fla. 1990). The Tafero, Medina, and Davis executions have now established a pattern of impermissible violence and mutilation.[37]

It is clear on the record before this Court that execution by electrocution as carried out in Florida is not limited to "the mere extinguishment of life" as required under *Kemmler*, for this method of execution entails undue violence and mutilation. This is particularly clear in light of the continuing – and apparently unavoidable – mishaps involving Florida's electric chair. The punishment that is actually meted out by DOC officials differs in kind from the simple sentence of death that the constitution permits and that was recommended by the penalty phase juries and ordered by the courts. Execution by electrocution as administered by DOC in Florida violates *Kemmler*.

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[37] *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) ("The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions."); *Squires v. Dugger*, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992) ("Absent a showing establishing a pattern of malfunctions in the operation of the electric chair, the Court cannot conclude that unnecessary pain is being inflicted during executions in the Florida electric chair.").

B. Electrocution Violates Evolving Standards of Decency

Execution by electrocution as administered in Florida also violates the "evolving standards of decency" criterion for several reasons. First, this practice, which was inaugurated in New York more than a century ago as a humane alternative to hanging, has been abandoned by scores of states and is now the sole method of execution in only three other states.

> Electrocution was first adopted by a state as a method of execution in 1888 and last adopted in 1949, at which time twenty-six states used it; since 1949 (i.e., almost half a century ago), no state has adopted electrocution and twenty states have dropped it; of thirty-eight states that currently authorize execution, only six (Alabama, Florida, Georgia, Kentucky, Nebraska, and Tennessee) require electrocution; of these six, two (Kentucky and Tennessee) have not executed any prisoners since the United States Supreme Court lifted its ban on capital punishment in 1976; four additional states (Arkansas, Ohio, South Carolina, and Virginia) offer electrocution as an option; of these four, one (Ohio) has not executed any prisoners since 1976. . . .

Jones, 701 So. 2d at 87 (Shaw, J., dissenting).[38]

Second, execution by electrocution is practiced *in no other country in the world*:

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[38] Both Kentucky and Tennessee have recently switched from electrocution to lethal injection as the official method of execution. *See* Ky. Rev. Stat. Ann. § 431.220 (Mitchie Supp. 1998); Tenn. Code Ann. § 40-23-114 (Supp. 1998).

> [O]f approximately 140 countries outside the United States that impose capital punishment, none impose electrocution; in short, only four governments in the entire world (Alabama, Florida, Georgia, and Nebraska) impose electrocution exclusively. . . .

Id. (emphasis omitted). As a postscript, I note that both the Humane Society of the United States and the American Veterinarian Medical Association condemn electrocution as a method of euthanasia for animals. *See id.* Third, other less cruel methods of execution are available; lethal injection is readily available (it has already been approved by the Florida Legislature[39]) and is generally considered more humane.[40]

And finally – and most telling – the governmental body charged with oversight of Florida's execution apparatus, the Florida Corrections Commission,[41] has recommended that Florida switch from electrocution to lethal injection. In the wake of the botched executions of Tafero and Medina, the Commission undertook an exhaustive survey of execution methods in other states and reported to the Governor and Legislature:

> We found that almost all states have written procedures regarding the execution process, and that numerous states had recently changed to lethal injection from electrocution because it was considered to be a "more humane method

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[39] *See* § 922.105(1), Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

[40] *See supra* note 11.

[41] *See* § 20.315(6), Fla. Stat. (1997).

> of execution." While the report notes problems encountered in the past with almost all methods of execution, including lethal injection, *the Commission recommends that Section 922.10, Florida Statutes, be amended to allow lethal injection as an alternative method of execution,* in addition to electrocution, for those persons currently on a sentence of death. Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida.
>
> *The Florida Corrections Commission believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and, just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur.*

Jones, 701 So. 2d at 82 (Kogan, C.J., dissenting) (emphasis omitted and added). Unfortunately, unlike the New York Legislature a century ago in *Kemmler*, the Florida Legislature has failed to heed the state's own experts and switch to the more humane method.

VI. SOLE METHOD OF EXECUTION

Section 922.10, Florida Statutes (1997), provides that a death sentence in Florida shall be carried out by electrocution:

> 922.10 Execution of death sentence; executioner. – A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. . . . The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.10, Fla. Stat. (1997). The statutory scheme makes no provision for an alternative method of execution, unless electrocution is declared unconstitutional.[42]

Because electrocution is the sole means of execution approved for use at this time in Florida, the constitutional infirmities inherent in this method cannot be avoided by the availability of a more humane alternative:

> Florida's electric chair, by its own track record, has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison. Because electrocution is the sole means of execution approved for use in Florida, the legislature has, so to speak, placed all its constitutional eggs in this one basket. As a result, any infirmity in this method cannot be mitigated at this time by the presence of an acceptable alternative. Such an all-or-nothing approach has proved fatal to the capital sentencing scheme in other states.

Jones, 701 So. 2d at 87-88 (Shaw, J., dissenting).

Both the California and Washington legislatures attempted to circumvent this same problem by implementing a death penalty scheme that offered capital defendants a choice in method of execution. California's statutory scheme originally offered a choice in method (lethal gas or injection) but called for the default to fall to lethal gas.[43] After the federal circuit court declared the

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[42] *See* § 922.105, Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

[43] *See* Cal. Penal Code § 3604(b) (West Supp. 1995).

original scheme unconstitutional under the federal Cruel and Unusual Punishments Clause because lethal gas is impermissibly cruel,[44] the state sought review in the United States Supreme Court. The California legislature promptly amended the statute to allow the default to fall to lethal injection.[45] Based on this legislative action, the United States Supreme Court vacated the circuit court decision and remanded for reconsideration.[46] Subsequently, a different capital defendant elected to be executed by lethal gas and then challenged that method anew. The circuit court reaffirmed its earlier ruling that execution by lethal gas is unconstitutional and enjoined the execution.[47]

In the State of Washington, the legislature took a similar tack when confronted with an adverse court ruling concerning its official method of execution – death by hanging. The Washington scheme originally had offered a choice (death by hanging or lethal injection), with the default falling to death by hanging.[48] After the federal

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[44] *See Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

[45] *See* Cal. Penal Code § 3604(b) (West Supp. 1996).

[46] *Gomez v. Fierro*, 519 U.S. 918 (1996). *See also Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998) (holding on remand that because Fiero had not yet chosen to be executed by lethal gas, he lacked standing to challenge the constitutionality of that method of execution and the claim was not ripe for decision). *Cf. Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997) (holding that constitutional challenge to execution by lethal gas in Arizona was not ripe for decision because the defendant had not yet chosen that method of execution).

[47] *LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999).

[48] *See* Wash. Rev.Code 10.95.180(1) (1994).

district court ruled that hanging was unconstitutional if applied to an inmate who was obese,[49] the state appealed. The Washington Legislature promptly amended the statute to allow the default to fall to lethal injection, and the federal circuit court dismissed the appeal as moot.[50]

VII. LETHAL INJECTION

Although electrocution has been the sole method of execution in this state since 1924, the legislature recently passed legislation that does two things: (1) It provides that no sentence of death shall be reduced if a method of execution is declared unconstitutional; and (2) it authorizes the use of lethal injection if electrocution is declared unconstitutional.

Section 775.082(2), Florida Statutes (1997),[51] has been amended to provide that no sentence of death shall be

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[49] *Rupe v. Wood*, 863 F.Supp. 1307 (W.D. Wash. 1994).

[50] *See* Wash. Rev. Code 10.95.180(1) (1998). *See also Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996) (vacating district court decision in light of subsequent legislative enactment).

[51] Prior to being amended, section 775.082, Florida Statutes (1997), provided as follows:

> 775.082 Penalties; mandatory minimum sentences for certain reoffenders previously released from prison. –
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

reduced to life if a method of execution is held to be unconstitutional:

> 775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison. –
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). *No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional*

> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

§ 775.082, Fla. Stat. (1997).

under the State Constitution or the Constitution of the United States.

§ 775.082(1)-(2), Fla. Stat. (Supp.1998) (emphasis added).

Although section 922.10, Florida Statutes (1997) (calling for execution by electrocution),[52] remains unchanged, chapter 922 has been amended to provide that if electrocution is held to be unconstitutional, then all capital defendants shall be executed by lethal injection:

> 922.105 Execution of death sentence by lethal injection if death by electrocution is declared unconstitutional; prohibition against reduction of death sentence as a result of determination that a method of execution is unconstitutional. –
>
> (1) A death sentence shall be executed by electrocution pursuant to s. 922.10. *If electrocution is held to be unconstitutional* by the Florida Supreme Court under the State Constitution, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding electrocution to be unconstitutional under the United States Constitution made by the Florida

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[52] Section 922.10, Florida Statutes (1997), provides as follows:

> 922.10 Execution of death sentence; executioner. – A death sentence shall be executed by electrocution. The warden of the state prison shall designated [sic] the executioner. . . . The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.10, Fla. Stat. (1997).

Supreme Court or the United States Court of Appeals that has jurisdiction over Florida, *all persons sentenced to death for a capital crime shall be executed by lethal injection.*

(2) The provisions of the opinion and all points of law decided by the United States Supreme Court in *Malloy v. South Carolina*, 237 U.S. 180 (1915), finding that the Ex Post Facto Clause of the United States Constitution is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders, are adopted by the Legislature as the law of this state.

(3) A change in the method of execution does not increase the punishment or modify the penalty of death for capital murder. Any legislative change to the method of execution for the crime of capital murder does not violate s. 10, Art. I or s. 9, Art X of the State Constitution.

. . . .

(6) Notwithstanding s. 775.082(2), s. 775.15(1)(a), or s. 790.161(4), or any other provision to the contrary, no sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the State Constitution or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

§ 922.105, Fla. Stat. (Supp.1998) (emphasis added).

The question posed in the present case is whether retroactive application of these statutory changes violates ex post facto principles. I conclude that it does not, based on *Malloy v. South Carolina*, 237 U.S. 180 (1915). There, South Carolina sought to apply its newly enacted method of execution, electrocution, to a defendant whose crime had been committed before the effective date of the new statute. The statute in effect at the time of the crime had called for death by hanging. The United States Supreme Court held that retroactive application of the more humane method of execution did not violate ex post facto concerns. I would apply Malloy to the present case and allow Provenzano's sentence to be carried out by lethal injection.[53]

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[53] I would recede from *Washington v. Dowling*, 109 So. 588 (Fla. 1926), to the extent that it is inconsistent with this conclusion. There, the statute that was in effect at the time of the crime called for death by hanging, and the sentence imposed by the trial court specified death by hanging. Before Washington was executed, however, the Legislature enacted a law abolishing hanging and calling for death by electrocution. The Governor issued a warrant ordering that Washington be electrocuted. The trial court ruled the warrant void because it differed from the sentence imposed by the court. The Governor then issued a new warrant ordering death by hanging. Washington petitioned the trial court, claiming that he could not be hung because the new law had abolished hanging. The trial court rejected the claim. This Court affirmed. The Court reasoned that (1) the trial court's sentence calling for death by hanging was final and could not be changed, and (2) the portion of the new law abolishing hanging could not operate to allow Washington to evade the court-ordered punishment. The Court relied on the Savings Clause of article 3, section 32, Florida Constitution (1885), which provided that "the repeal or amendment of any criminal statute shall not affect the

VIII. CONCLUSION

Execution by electrocution – with its attendant smoke and flames and blood and screams – is a spectacle whose time has passed. The fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis are acts more befitting a violent murderer than a civilized state. The color photos of Davis depict a man who – for all appearances – was brutally tortured to death by the citizens of Florida. Violence begets violence, and each of these deaths was a barbaric spectacle played by the State of Florida on the world stage. Each botched execution cast the entire criminal justice system of this state – including the courts – in ignominy.

The United States Constitution stands before the world not as a dark testament to wanton, state-sponsored violence and mutilation, but rather – in the spirit of the founding fathers – as an enduring beacon of light and hope and justice. The United States Supreme Court has ruled that a principal purpose of the Cruel and Unusual Punishments Clause is

> to protect the dignity of society itself from the barbarity of exacting mindless vengeance.

Ford v. Wainwright, 477 U.S. 399, 410 (1986). Our Constitution – this nation's sacred charter – abides as a paragon of

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prosecution or punishment of any crime committed before such repeal or amendment." I would recede from that portion of *Washington* wherein the Court held that the sentence could not be carried out by electrocution. The Savings Clause thus would be inapplicable. *See, e.g., State v. Watts*, 558 So.2d 994 (Fla.1990) (explaining that the purpose of the Savings Clause is prevent a defendant from *evading* punishment).

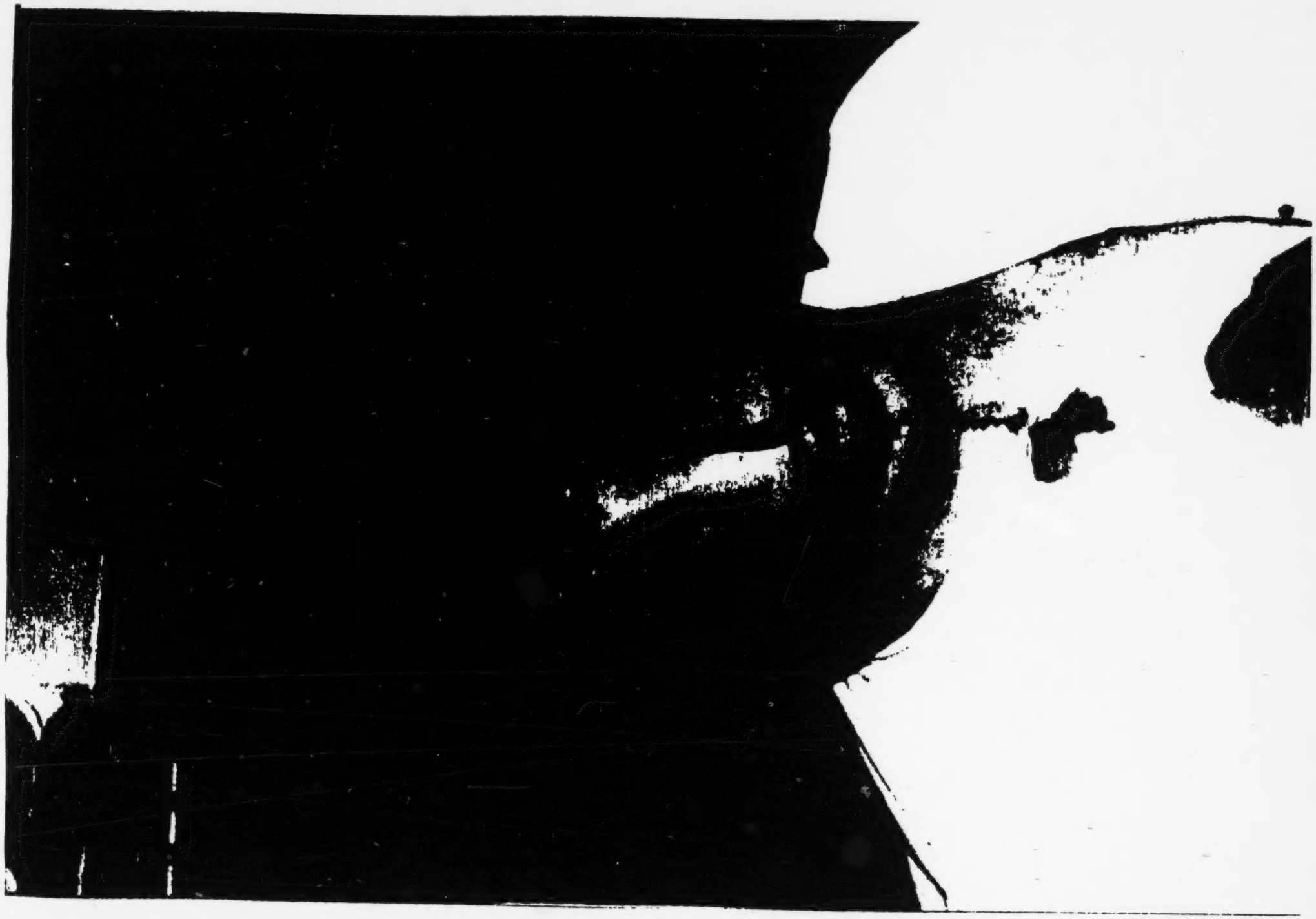
all that is good and decent in the law, a shining example for the world to follow.

Only three other states in the union – Alabama, Georgia and Nebraska – continue to follow Florida's lead in requiring electrocution as the sole means of execution. Scores of states have abandoned this practice. *No other country in the world uses electrocution as a means of execution.* The State's own preeminent experts in this field – i.e., DOC's advisory committee – have recommended that Florida forsake this outdated practice in favor of lethal injection. There comes a time when the Constitution must say "enough is enough."

I would direct that the sentence in the present case be carried out by lethal injection as prescribed by statute.

ANSTEAD, J., concurs.

(POST-EXECUTION PHOTOS OF ALLEN LEE DAVIS WILL BE APPENDED TO THIS DISSENTING OPINION OF SHAW, J.)



ANSTEAD, J., dissenting.

I concur in the scholarly opinions of Justice Shaw and Justice Pariente. I also commend the opinion of Chief Justice Harding which, while contrary to my own on the constitutional issues in question, makes out a compelling case for abandoning electrocution as a method of enforcing the death penalty.

The views of the Chief Justice, Justice Shaw, and Justice Pariente are deeply rooted in the jurisprudence of the U.S. Supreme Court and of this Court. Perhaps no jurist has more eloquently made the same point than our own Justice Ervin in his dissenting opinion in this Court's landmark case of *State v. Dixon*:

> The nation's highest court recognizes we have come a long way from the rack, the "drawing and quartering," the headsman's axe, the public executions, the "hanging judge" – from cruel and unusual punishments. We can little afford to turn back because it is clear to thinking people that brutality and cruelty at the hands of government soils the fabric of an enlightened nation. Governments are constantly under scrutiny – constantly gauged by a nation's thinking people in terms of whether they are enlightened and humane; of whether they are still instruments of oppression, perpetuators of archaic punishments to allay the fears and passions of privileged groups.

State v. Dixon, 283 So.2d 1, 23 (Fla.1973) (Ervin, J., dissenting). Justice Ervin's words seem perfectly suited to today's debate on whether the continuing use of the electric chair constitutes cruel or unusual punishment. His words also strike a chilling chord today because we

are presented with a record and graphic evidence, including photographs, of the horror of Florida's most recent use of the electric chair.

CRUEL OR UNUSUAL

An obvious failing of the majority opinion is its apparent unwillingness to directly confront and explain the Florida Constitution's prohibition of cruel or unusual punishments and the ban of cruel and unusual punishments in the U.S. Constitution.[54] If the majority did so it would surely have to conclude that at the very least punishing someone by the direct application of lethal doses of electricity to various parts of the body is a highly unusual method of punishment, whether considered

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[54] The resolution of these issues should also serve as an apt reminder that the responsibility of our courts does not end with the mere mechanical processing of cases. We must directly confront the important and sensitive issues that are presented to us. And, of course, there is no greater responsibility assigned to us than to see that the criminal justice process is carried out in accord with the provisions of the Florida and United States Constitutions. It is the exercise of that responsibility that is made visible in the various opinions of the justices of this Court in this case, and it is the diligent exercise of that responsibility that defines the very essence of the role of this Court in the scheme of Florida's constitutional government. We cannot shirk that responsibility because it arises in the context of outrageous criminal conduct involving totally blameless victims. While those extreme circumstances form the backdrop for the issues we confront and may give rise to the most passionate of emotional reactions, it is peculiarly and importantly within the charge of the justice system to be certain that we resolve these important issues without resort to the distorting influences of passion and emotion.

years ago when our constitutions were approved, or considered today. In fact, the United States Supreme Court has quoted with approval an opinion of the New York Court of Appeals characterizing electrocution as "certainly unusual". *In re Kemmler*, 136 U.S. 436, 443-44 (1890). Electrocution is simply not a "usual" form of punishment, and it cannot somehow be made "usual" by its continued use. If we were to allow an "unusual" punishment to become "usual" simply by its repeated usage then we simply would be editing out the ban on unusual punishments in the Florida Constitution.

Determining whether electrocution is a cruel punishment requires more analysis. Arguably, for example, electrocution may not have been considered cruel when it was first introduced in the nineteenth century, because it was then compared to death by hanging and considered more humane than hanging. In fact, the U.S. Supreme Court expressly relied upon findings that electrocution would be more humane than hanging in refusing to interfere with New York's decision to abandon hanging (as a barbaric practice from the dark ages) in favor of the more humane electrocution. *In re Kemmler*. Based on the prevailing culture and knowledge at the time, and the urgency to do away with hanging, it is easy to understand why electrocution may not have been considered constitutionally cruel. However, just as electrocution may have been originally evaluated in comparison with hanging, we know today that the overwhelming majority of death penalty jurisdictions have long since rejected use of the electric chair and have turned to lethal injection as a more humane punishment.

As noted above, *In re Kemmler* was decided in the context of a state's attempt to find a more humane means of death than hanging. However, it is also important to note that the case was decided before electrocution had actually been used. Because we know that lethal injection provides a more humane alternative, and, because we now know from actual experience that electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc.), as well as a culture of cruelty ("burn 'em", "fry 'em"), it is apparent that electrocution has become a cruel and senseless punishment, especially when evaluated in light of our evolving standards of decency. Hopefully, just as those who reflected back on the history of hanging at the close of the nineteenth century and concluded it was inhumane, we now, at the close of the twentieth century, have an even more informed and enlightened view of acceptable punishments upon which to evaluate death by electrocution.

In Justice Shaw's opinion he again notes that for humane reasons we as a society have rejected the use of electrocution even for the killing of animals. That simple but eloquent observation perhaps speaks more directly to the heart of the issue before us than any other argument. In effect, we have found the killing of animals by electrocution to be inhumane and uncivilized. We know, as the State has candidly conceded, that the entire process of death by electrocution is at least "somewhat ghastly". We also know, as aptly explained by Chief Justice Harding, that a more humane means of taking life is readily available to the State. Under those circumstances, our continuing embrace of a savage and inhumane means of taking

life does a disservice to our justice system and our society.[55]

SHAW, J., concurs.

PARIENTE, J., dissenting.

I write to explain the reasons I am compelled to dissent in this case. The subject of the debate presented by this case is not whether the death penalty is a constitutionally permissible punishment for those in this State who commit the most aggravated and least mitigated crimes, such as Allen Lee Davis and Thomas Provenzano. Thus, this case does not have to do with the legislative

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[55] Indeed, it cannot be gainsaid that our justice system is not simply an instrument of vengeance, despite the connotations to that effect contained in the extreme rhetoric that sometimes surrounds the constitutional debate over the continuing use of the electric chair. Unfortunately, the constitutional debate over whether killing a condemned murderer by electrocution constitutes cruel or unusual punishment is recklessly cast by some in terms of a failure of society and the justice system to consider the fate of the innocent victims of the condemned defendant's crimes. That suggestion misperceives the essential role of the justice system, distorts the constitutional debate, and factually misses the mark. Of course, in addition, nothing could be further from reality. The reality is that our society so values human life that we reserve our harshest criminal penalties for violent acts that threaten or take an innocent human life. So, it can hardly be said that the taking of an innocent life is ignored by society or its justice system. But it must never be said that the American justice system has refused to properly confront the issues that it has been given the unique responsibility to decide or, worse yet, that the justice system has allowed itself to become a means for extracting vengeance. We have too often seen the failure of societies whose court systems operate in such ways.

prerogative to specify the punishment for the crime – whether it be death, life in prison, or a sentence of a definite number of years in prison.

Rather, the subject of the legal debate before this Court solely concerns the scope of the legislative prerogative to select one method of execution over another. Thus, the issue in this case is not *whether* Provenzano should be executed; only *how* he should be executed.[56] It is without question that the legislative prerogative to choose a given *method of execution* must be judged by the prohibition against the infliction of cruel and unusual punishment found in the Florida and federal constitutions. *See* U.S. Const., amend. VIII; art. I, § 17, Fla. Const.

As the United States Supreme Court stated in *Wilkerson v. Utah*, 99 U.S. 130, 133 (1878), although the legislative branch may define crimes and "prescribe the punishment of the offenders," this power is "*subject to the prohibition of the Constitution that cruel and unusual punishments shall not be inflicted.*" (Emphasis supplied.) Almost one hundred years later, this principle was reiterated: "It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively

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[56] Last year when I joined the Court, I joined with Chief Justice Harding in urging the Legislature to switch to lethal injection. However, our Legislature, while providing for lethal injection *if* electrocution is declared unconstitutional, has elected to retain electrocution as its sole method of execution. This leaves the Court with no choice but to fulfill our obligation to examine the constitutional question.

approved or not." *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 313-14 (1972) (White, J., concurring)).[57]

"[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a challenged punishment, guided by "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592, 597 (1977) (plurality opinion). Thus, the Court must exercise its own judgment as to whether a method of execution is cruel and unusual in order to enforce the requirement of the

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[57] *See also Furman v. Georgia*, 408 U.S. 238, 263-68 (1972) (per curiam) (Brennan, J., concurring) (citations omitted):

> [The Framers] included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had unfettered power to prescribe punishments for crimes. . . .
>
> . . . Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced. . . .
>
> . . . The right to be free from of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; (it) depend(s) on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."
>
> Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.

Eighth Amendment that cruel and unusual punishment not be inflicted.

To determine whether electrocution constitutes cruel and unusual punishment, we must first consider what the United States Supreme Court has considered to be the purpose and scope of the Eighth Amendment's prohibition against cruel and unusual punishment. As explained in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Eighth Amendment must draw its "meaning from the evolving standards of decency that mark the progress of a maturing society."

Perhaps the most concise discussion of the scope of the Eighth Amendment is set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976):

> It suffices to note that the primary concern of the drafters [of the Eighth Amendment] was to proscribe *"torture(s)" and other "barbar(ous)" methods of punishment.* Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment. . . .
>
> Our more recent cases, however, have held that the Amendment *proscribes more than physically barbarous punishments.* The Amendment embodies "broad and idealistic concepts of *dignity, civilized standards, humanity, and decency* . . . ," against which we must evaluate penal measures. Thus, *we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or which "involve the unnecessary and wanton infliction of pain."*

Id. at 102 (citations omitted) (emphasis supplied). This clause has an "expansive and vital character." *Glass v. Louisiana*, 471 U.S. 1080, 1083 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting *Weems v. United States*, 217 U.S. 349, 377 (1910)). "[T]he Amendment has been interpreted in a flexible and dynamic manner." *Gregg*, 428 U.S. at 171. As concepts of civility and dignity evolve, so do the limits of what constitutes cruel and unusual punishment. *See Dulles*, 356 U.S. at 100. Accordingly, Eighth Amendment issues must be evaluated "in light of contemporary human knowledge," *Robinson v. California*, 370 U.S. 660, 666 (1962), rather than "in reliance on century-old factual premises that may no longer be accurate." *Glass*, 471 U.S. at 1083 (Brennan, J., dissenting from denial of certiorari). These broad statements of constitutional principles apply with equal force to determine the legality of a method of execution. *See Campbell v. Wood*, 511 U.S. 1119, 1121 (1994) (Blackmun, J., dissenting from denial of certiorari) (explaining that the United States Supreme Court has never "distinguished between challenges to the proportionality and method of capital punishment").

In holding that the absence of conscious pain after the electrical current is administered ends the judicial inquiry into whether electrocution is unconstitutional, the majority decision in this case relies on our opinion in *Jones v. State*, 701 So.2d 76, 79 (Fla.1997), *cert. denied*, 118 S.Ct. 1297 (1998). *Jones* in turn cites to *Gregg v. Georgia*, 428 U.S. 153 (1976), *Louisiana ex. rel Francis v. Resweber*, 329 U.S. 459 (1947), and *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994). However, no such narrow and conclusive statement can be derived from those cases.

The fact that the method of execution may result in instantaneous death, while an important factor to consider, does not end the judicial inquiry into whether the method of punishment is cruel and unusual. Analyzing the constitutionality of punishment under the Eighth Amendment, the Supreme Court in *Gregg* also stated that a "penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' " 428 U.S. at 173 (quoting *Dulles*, 356 U.S. at 100).

Further, the Campbell decision relied on the following statement in *Glass*:

> What are the objective factors by which courts should evaluate the constitutionality of a challenged method of punishment? First and foremost, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." *Gregg v. Georgia, supra*, at 173 (opinion of Stewart, Powell, and Stevens, JJ.). *See also Coker v. Georgia, supra*, at 592, (plurality opinion) (a punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). *The Court has never accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life.*

Glass, 471 U.S. at 1084 (Brennan, J., dissenting from denial of certiorari) (emphasis supplied), *cited in Campbell*, 18

F.3d at 682. However, *Campbell* failed to cite to the remainder of Justice Brennan's explanation in *Glass* that the contours of the Eighth Amendment extend beyond whether there is conscious pain inherent in the method of execution:

> The Eighth Amendment's protection of "the dignity of man," *Trop v. Dulles, supra,* at 100, (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. *Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, e.g.,* Royal Commission on Capital Punishment, 1949-1953 Report ¶ 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. *Ibid.* These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. *See, e.g., Wilkerson v. Utah, supra,* at 135.

Glass, 471 U.S. at 1085 (Brennan, J., dissenting from denial of certiorari). Thus, the Eighth Amendment also requires that the method of execution minimize physical violence as well as mutilation and distortion of the human body.

Therefore, my conclusion differs from the majority because I fail to see how United States Supreme Court precedent allows us to limit our constitutional inquiry to the presence or absence of conscious pain. Even the concurring opinion of Justice Quince recognizes that the "real question" is whether electrocution violates the "evolving standards of decency." Concurring opinion of

Quince, J., at 17. In apparent recognition that the constitutional inquiry is not so limited, the State conceded in oral argument that the guillotine would not pass constitutional muster today, even though it most likely results in an instantaneous death without the defendant suffering conscious pain.

No one seriously disagrees that as of the end of the twentieth century, lethal injection is a more humane method of execution and creates far less a spectacle than electrocution. It is less physically violent and minimizes mutilation of the body. No one seriously disagrees that electrocution was originally selected by the State of New York in 1885 in lieu of hanging because *at that time* the executive and legislative branches affirmatively determined that electrocution was the "most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." *In re Kemmler*, 136 U.S. 436, 444 (1890). There is no indication that the legislative decision in 1999 to retain electrocution, contrary to the recommendations of the Florida Corrections Commission, was based on objective evidence that this method was more humane than lethal injection or other alternative methods.[58]

The Legislature does not have the prerogative to select a method of execution that is inherently cruel,

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[58] In fact, it appears the prime concern of the Legislature was that the death sentences not be invalidated as a result of a change in the method of execution. As Justice Harding's concurring opinion and Justice Shaw's dissent explain, the change to lethal injection would not result in any death sentence being vacated.

violent and mutilating when more humane methods exist. The State's only legitimate interest is in the extinguishment of life. Indeed, the State has not made the argument in this case that the Legislature has the "right" to make the execution more violent and more cruel than necessary to extinguish the lives of those sentenced to death.

In determining whether electrocution comports with "evolving standards of decency," we should consider the fact the Florida Corrections Commission recommended that the electric chair be phased out as a method of execution in favor of lethal injection because it "believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and, just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur." *Jones*, 701 So.2d at 82 (Kogan, C.J., dissenting) (quoting Florida Corrections Comm'n, *Supplemental Report on Execution Methods Used by States* (1997)).

We cannot ignore the objective evidence that almost every state that authorizes the death penalty has either selected or changed its method to lethal injection – some in response to the botched executions of Medina and Tafero. While the fact that only three other states (Georgia, Alabama, and Nebraska[59]) retain electrocution as the sole method of execution is not determinative of the constitutional question, this fact bears on the exercise of

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[59] In Nebraska, legislation has been proposed that would change the method of execution from electrocution to lethal injection. *See* LB 52, 96th Leg., 1st Spec. Sess. (Neb.1999).

the Court's judgment as to whether the method of punishment violates contemporary standards of decency. *See Gregg*, 428 U.S. at 172-76.

In addition, we must look at the actual experience in recent years with the electric chair. Recent executions have revealed one problem after another.[60] Flames spewed from the heads of Medina and Tafero. *See Jones*, 702 So.2d at 85-86. The cause was found to be an improper sponge. *See id.* at 86. After two flaming executions, the sponges were replaced and the flames ceased. However, it is undisputed that despite all of the best efforts, electrocution will result in burning of parts of the body. In fact, all of the inmates in the last executions have sustained outward burns to their bodies. Thus, burning is inherent in the method of the execution.

It is undisputed that, despite all best efforts, inmates have been observed breathing after the electric current has ceased. This indicates that brain stem activity has continued even after the application of electrical current. Now with the last execution, there is a serious question as to whether the mouth piece partially asphyxiated Davis, which resulted in bloody side show – a spectacle more

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[60] I agree that the Department of Corrections (DOC) appears to be attempting in good faith to correct recurrent problems that have turned a series of executions over the last few years into something of a freak show. In fact, it is precisely because these problems continue to occur, despite the best efforts of DOC, that the electric chair is not only unconstitutional as applied in Florida, but per se unconstitutional as a cruel and unusual punishment incompatible with evolving standards of decency.

befitting of a "B" Hollywood horror movie than a state-sanctioned execution.

Although a factual finding has been made by two different circuit court judges that Florida's electric chair causes no conscious pain, these factual findings need only be made by a preponderance of the evidence. Despite our deferential standard of review to trial court's factual findings, the expert testimony submitted by Provenzano and the witness accounts of survival after electrocution raise serious questions that judicial electrocution does in fact involve conscious pain and suffering. *See generally Glass*, 471 U.S. at 1086-87 (Brennan, J., dissenting from denial of certiorari) ("There is considerable empirical evidence and eyewitness testimony . . . [that] suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the 'mere extinguishment of life.' "). We cannot simply ignore this evidence.

As Justice Brennan observed, "[I]t is firmly within the 'historic process of constitutional adjudication' for courts to consider, *through a 'discriminating evaluation' of all available evidence, whether a particular means of carrying out the death penalty is 'barbaric' and unnecessary in light of currently available alternatives.*" *Id.* at 1084 (quoting *Furman*, 408 U.S. at 420 (Powell, J., dissenting)) (emphasis supplied).[61] All of this leads to the conclusion that this method of execution does not comport with "evolving

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[61] Justice Powell's views in *Furman v. Georgia*, 408 U.S. 238 (1976), were largely adopted by the Supreme Court as the analysis to be used in Eighth Amendment claims in *Gregg v. Georgia*, 428 U.S. 153 (1976).

standards of decency," *Trop*, 356 U.S. at 101, based on an evaluation of "objective factors." *Coker*, 433 U.S. at 592.

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Resweber*, 329 U.S. at 464 (emphasis supplied). Certainly, knowledge of death involves fear, which is inevitable with all impending executions. However, all of the other troubling aspects of recent electrocutions – the flames, the blood, the screams, the burning, and the resulting spectacle of the actual execution – indicate to me that there is cruelty, violence and mutilation inherent in this method of execution.

In enacting the Eighth Amendment, the founders of this Nation determined that, as a civilized nation, we would not allow the State to become the instrument of cruelty and violence in the methods chosen to punish those who violated the law. This enduring constitutional principle applies no matter how great our desire as individuals for vengeance and no matter how cruel, how ghastly, or how violently the innocent victims died.

We do not have to wait another fifty years to determine that in 1999, electrocution is not only unusual, since only three states including Florida currently execute its death-sentenced offenders solely by electrocution, but it is also inherently cruel as involving mutilation and violence. Electrocution, as a method of carrying out the State's legitimate interest in imposing the ultimate penalty of death, has become incompatible with the concepts of "dignity, civilized standards, humanity, and decency"

that embody the essence of the Eighth Amendment. *Estelle*, 429 U.S. at 102. History and this Court's recent experience with the electric chair all point to this inevitable conclusion. Just as the guillotine, public hanging and death by firing squad would be deemed barbaric relics of another era, so must electrocution be declared unconstitutional as violative of the Eighth Amendment's clear prohibition that cruel and unusual punishment not be inflicted.

ANSTEAD, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Original Proceeding – Habeas Corpus

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for Respondent

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

[637] TURNED OFF.

RECOGNIZING THERE ARE NOT CONTROLLED EXPERIMENTS IN HUMAN EXECUTION WITH ELECTRICITY, ONE USES THESE ANIMAL MODELS TO INTERPRET WHAT'S GOING ON.

AND THE TURNING OFF OF THE RESPIRATOR FOR A PARALYZED ANIMAL IS EQUIVALENT TO TURNING ON VOLTAGES THAT ARE SUFFICIENTLY HIGH THAT THE INTERCOSTAL PECTORAL DIAPHRAGMATIC AND ABDOMINAL MUSCLES CANNOT CONTRACT SO THE PERSON CANNOT BREATHE. SO THE FIRST ACTION ON THE MACROSCOPIC PHYSIOLOGY IS THAT OF BEING ASPHYXIATED.

NOW, IF YOU WANT TO GO BEYOND THAT, PEOPLE SURVIVE THAT PROCESS BECAUSE THERE ARE CASES OF HUNDREDS OF PEOPLE WHO HAVE SURVIVED HIGH-VOLTAGE INJURY.

WHAT IS VASTLY MORE COMPELLING IN MY MIND IS THE SUBSET OF THESE PATIENTS – THESE ARE PATIENTS BECAUSE THEY'RE CASE STUDIES, WHO REPORT OR WERE REPORTED TO MAINTAIN CONSCIOUSNESS THROUGH THE EPISODE. THROUGH THE ACCIDENT.

BY MR. THOMAS:

Q DO YOU HAVE A CASE STUDY THERE, DOCTOR, THAT WOULD BE ILLUSTRATIVE OF HIGH-

VOLTAGE ELECTRICAL INJURY TO THE HEAD OF AN INDIVIDUAL?

[638] **A** OKAY. I THINK IT WOULD BE – THE COURT'S FORBEARANCE, IT WOULD BE WORTH READING SEVERAL SENTENCES FROM EACH OF ABOUT 10 ARTICLES THAT DESCRIBE WHAT'S GOING ON. CASE ONE. I CAN GIVE YOU – DO YOU WANT THE CITATIONS?

THE COURT: WELL, I THINK IT'S GOT TO BE IN THE RECORD WHAT YOU'RE READING.

MR. THOMAS: YOUR HONOR, THE QUESTION IS – I AM INTENDING TO OFFER SUBSTITUTE COPIES OF THESE DOCUMENTS BECAUSE THESE ARE DR. WIKSWO'S ONLY PERSONAL COPIES.

THE COURT: THEY'RE SOMEBODY ELSE'S ARTICLES? THEN IT OUGHT TO BE STATED WHERE THEY'RE FROM.

THE WITNESS: ARTICLE ENTITLED –

MR. NUNNELLEY: YOUR HONOR, I OBVIOUSLY HAVE NOT BEEN PROVIDED A COPY OF THIS. IF A COPY CAN BE PROVIDED TO ME SO I CAN READ IT IN PREPARATION FOR CROSS-EXAMINATION, WHICH WOULD BE APPRECIATED.

MR. THOMAS: I CAN DO THAT DURING OUR BREAK.

THE COURT: LOOK OVER HIS SHOULDER IF YOU WANT TO.

THE WITNESS: HELP YOURSELF.

MR. NUNNELLEY: OKAY.

[639] **THE WITNESS:** BRING A CHAIR.

MR. NUNNELLEY: PLAN ON BEING THAT LONG, DOCTOR?

THE WITNESS: MAYBE.

MR. NUNNELLEY: GOT ALL NIGHT.

(WITNESS READING:)

THE WITNESS: JOURNAL OF TRAUMA, 1975, SPINAL CORD INJURY FOLLOWING ACCIDENTS CASE REPORTS. FIRST AUTHOR, NORMAN S. LEVINE. CASE ONE.

THE FIRST PATIENT WAS A 35-YEAR-OLD FARMER WHO, WHILE RIDING ON A GRAVEL BIN, STRUCK HIS HEAD AGAINST A HIGH-VOLTAGE POWER LINE. FIGURE ONE. HE DENIED LOSS OF CONSCIOUSNESS. PHYSICAL EXAMINATION REVEALED 10 PERCENT BODY AREA – BODY SURFACE AREA BURNS INVOLVING THE RIGHT FACE, NECK, RIGHT SHOULDER AND RIGHT KNEE.

AND THIS IS THE PHOTOGRAPH OF THE BURNS OF THE PATIENT WHO SURVIVED CONTACT WITH THE HIGH-VOLTAGE POWER LINE.

SECOND, A –

MR. NUNNELLEY: YOUR HONOR, IF I COULD ASK THE WITNESS TO SEPARATE THE ONES THAT HE READS OUT SO THAT I CAN RETURN TO THEM FOR CROSS-EXAMINATION.

[640] **THE COURT:** PLEASE DO.

THE WITNESS: I'M DOING THAT. THANK YOU. THE JOURNAL IS S.A. MEDISE TYDKKRIF, M-E-D-I-S-E-T-Y-D-K-K-R-I-F, FROM 27 FEBRUARY, 1982. I BELIEVE IT'S A SOUTH AFRICAN ARTICLE. HIGH-VOLTAGE ELECTRICAL INJURY ACCIDENT, A CASE REPORT AND REVIEW OF THE LITERATURE.

A WELL-BUILT OVAMBO, O-V-A-M-B-O, WORKER WEIGHING 100-KILOGRAMS SUFFERED AN 11,000-VOLT ELECTRICAL INJURY WHEN HE ACCIDENTALLY CLASPED TWO GUIDE-WIRES SUSPENDED FROM WOODEN POLES CARRYING HIGH-TENSION CABLES.

ON ADMISSION TO THE HOSPITAL LESS THAN ONE HOUR AFTER INJURY, THE PATIENT WAS SLIGHTLY CONFUSED BUT DENIED ANY LOSS OF CONSCIOUSNESS.

THE THIRD ARTICLE IS IN THE JANUARY 13TH, 1934 LANCET. ENTITLED "NEUROLOGICAL EFFECTS OF LIGHTENING [sic] AND OF ELECTRICITY." BY MCDONALD CRITCHLEY, C-R-I-T-C-H-L-E-Y. AND TWO OTHER AUTHORS.

NOW, THIS IS AN EXAMPLE. THERE ARE TWO EXAMPLES IN HERE. THE FIRST TYPE IS DELAYED DEATH. MALE, AGED 42 YEARS: DEATH FROM BURNS AND EXHAUSTION FOUR HOURS AFTER A SHOCK OF 66,000 VOLTS.

[641] MALE, AGED 18: DEATH FROM PNEUMONIA AND TOXEMIA FROM BURNS 17 DAYS AFTER A SHOCK FROM 132,000 VOLTS.

MALE, AGED 35 YEARS: DEATH FROM BURNS AND TOXEMIA EIGHT DAYS AFTER A SHOCK FROM 19,000 VOLTS.

THERE IS NO STATEMENT OF CONSCIOUSNESS ON THESE, BUT THIS ARTICLE IS INTERESTING IN THAT IT STATES THAT DEATH WAS NOT INSTANTANEOUS AT THOSE SHOCKS.

THERE ARE TWO COMMENTS – THERE ARE TWO COMMENTARIES. ONE IS AT LOW VOLTAGE, WHICH I WON'T READ.

THERE IS ANOTHER COMMENTARY: A BOY, AGED 12, CLIMBED A 30-FOOT PYLON CARRYING A HIGH-TENSION WIRE AT A PRESSURE OF 11,000 VOLTS AC. AT THE TOP, HE TOUCHED THE WIRE WITH HIS ARM, RECEIVED A SHOCK AND FELL TO THE GROUND. THE VILLAGE WAS PLUNGED INTO DARKNESS AND THE RADIOS CUT OFF, BUT THE BOY HIMSELF SEEMED LITTLE THE WORSE. HE PICKED HIMSELF UP AND WALKED HOME A DISTANCE OF A QUARTER OF A MILE. HIS PARENTS NOTICED HE WAS A LITTLE PALE AND SUBDUED. THEY DID NOT SUSPECT ANYTHING UNTIL THE BOY ASKED FOR HIS LUNCH. ACTUALLY, HE HAD HIS LUNCH LONG [642] BEFORE, AND ALSO HIS TEA. NEIGHBORS WHO HAD SEEN HIM FALL FROM THE PYLON NOW ARRIVED ON THE SCENE AND EXPLAINED MATTERS.

THIS IS AN ARTICLE FROM THE JOURNAL OF TRAUMA, 1990. "NEUROLOGICAL CONSEQUENCES OF ELECTRICAL BURNS." FIRST AUTHOR, GRUBE, G-R-U-B-E. LOSS OF CONSCIOUSNESS OCCURRED IN

29 OF THE 64 PATIENTS IN THE HIGH-VOLTAGE GROUP. TABLE THREE.

AND IN THIS CASE, THE HIGH-VOLTAGE GROUP WAS 54 – 54 OF THE 64 PATIENTS IN THE HIGH-VOLTAGE GROUP HAD KNOWN VOLTAGES. THE MEDIAN VOLTAGE WAS 7,200 VOLTS AND RANGED FROM 440 VOLTS TO 150,000 VOLTS. SO MY INTERPRETATION OF THIS ISSUE – OF THE 64 PATIENTS, 35 OF THEM REMAINED CONSCIOUS DURING THE SHOCK.

AN ARTICLE FROM CRITICAL CARE MEDICINE, 1990, CLINICAL PREDICTORS OF MYOCARDIAL DAMAGE AFTER HIGH-VOLTAGE ELECTRICAL INJURY. FIRST AUTHOR, CHANDRA, C-H-A-N-D-R-A.

THEY EVALUATED 34 PATIENTS WITH HIGH-VOLTAGE ELECTRICAL INJURIES ADMITTED BETWEEN FEBRUARY 1982 AND OCTOBER OF 1984. THEY DIVIDED THE PATIENTS INTO TWO GROUPS. GROUP A WAS EXPOSED TO BETWEEN 3,000 AND 130,000 VOLTS. NINE DID NOT [643] LOSE CONSCIOUSNESS, FOUR DID. GROUP B WAS 440 VOLTS TO 7,000 VOLTS. SIX LOST – CORRECTION, SIX DID NOT LOSE CONSCIOUSNESS AND FIVE DID.

ANOTHER ARTICLE. FROM THE "ANNALS OF EMERGENCY MEDICINE." MYOCARDIAL INFARCTION FOLLOWING ELECTRICAL INJURY. 1982. K-I-N-N-E-Y, KINNEY, FIRST AUTHOR.

A 57-YEAR-OLD MAN WAS ONE OF SEVERAL WORKERS INJURED AT A CONSTRUCTION SITE. A CRANE BOOM INADVERTENTLY CONTACTED A

HIGH-TENSION LINE RATED AT 23,000 VOLTS. THE RESULTING ELECTRICAL CIRCUITY [sic] ELECTROCUTED THE CRANE OPERATOR.

OUR PATIENT WAS STANDING BEHIND THE CRANE HOLDING A WELDING TORCH THAT MAY HAVE COME INTO DIRECT CONTACT WITH THE CRANE BODY. OBSERVERS REPORTED THAT THE PATIENT WAS THROWN SIX TO EIGHT FEET IN THE AIR. THE PATIENT ADMITTED THAT HE DID FEEL THE ELECTRIC SHOCK AND THE RESULTING MOMENTARY PARALYSIS BUT DID NOT RECALL BEING THROWN TO THE GROUND. HE MAY HAVE LOST CONSCIOUSNESS FOR SEVERAL SECONDS.

THIS IS AN ARTICLE FROM CHAPTER 24 OF – I HAVE TO FIND THE BOOK. BUT IT'S AN ARTICLE ENTITLED "ELECTRICAL TRAUMA" BY FREDERICK PANSE, P-A-N-S-E.

[644] AND HE QUOTES AN ARTICLE WRITTEN BY MCLAUGHLIN IN 1930 WHO IN TURN QUOTED A [sic] WORDS OF A PATIENT WHO STOOD ON A LADDER IN A TRANSFORMER STATION HOLDING ONTO AN IRON WALL BRACKET WITH HIS LEFT HAND WHICH WAS IN A LEATHER GLOVE, AND STRETCHING HIS RIGHT HAND TOWARDS 22,000-VOLT TRIPHASIC AC CONDUCTOR WHICH HE BELIEVED TO BE SWITCHED OFF.

THE VICTIM STATED, "WHEN THE BACK OF MY RIGHT HAND GOT WITHIN ONE-HALF TO THREE-QUARTERS OF AN INCH FROM THE CONDUCTOR, SIX OR SEVEN NARROW BLUE SPARKS SUDDENLY JUMPED TO THE KNUCKLE OF MY RING FINGER.

"AT ONCE, MY HEAD SEEMED TO GET BIGGER AND BURST WITH PAIN. I HEARD THE MOST FRIGHTENING NOISES IN MY HEAD AND EARS, AS IF I HAD BECOME A MIGHTY GENERATOR INSIDE. AT THE SAME TIME, MY BODY, LEGS AND FEET SEEM TO SHRINK DOWN TO NOTHING UNTIL I FELT THAT I COULD HAVE STOOD ON A 10-CENT PIECE.

"SIMULTANEOUSLY I FELT A BURNING SENSATION IN BOTH HANDS. I COULD NOT SAY HOW MANY SECONDS IT LASTED, BUT IT SEEMED TO ME A TERRIBLY LONG TIME. MY SENSES WERE PARTIALLY NUMBED, BUT I REMAINED CONSCIOUS, AND I FELT AS IF I WAS IN THE [645] CLAWS OF A MIGHTY MONSTER. MY EFFORTS TO MOVE MY RIGHT ARM OR HAND AGAINST THIS MAGNETIC POWER WERE QUITE UNAVAILING. EVEN MY EYES SEEMED FIXED AND STARING."

AN ARTICLE FROM THE JUNE 1968 JOURNAL OF NEUROLOGY, TITLED, "DELAYED NEUROLOGICAL SEQUELAE OF ELECTRICAL INJURIES" BY DONALD FARRELL AND ARNOLD STARR.

A 67-YEAR-OLD RIGHT-HANDED MAN WAS INJURED ON JUNE 1ST, 1964 BY 18,000 VOLTS AC, 60 HERTZ, FROM A HIGH-TENSION LINE WHILE AT WORK AS A PIPEFITTER. HE WAS STANDING ON A ROCK GUIDING ONE END OF A METAL PIPE WITH HIS RIGHT HAND WHEN THE OTHER END OF THE FINE [sic] HIT THE HIGH-TENSION LINE.

HE REMEMBERS A LOUD, QUOTE, "BANG," CLOSED QUOTE AND WAS TOLD HE WAS THROWN ABOUT FOUR FEET FROM THE ROCK. HE WAS

DAZED FOR ONLY A FEW SECONDS AND RESUMED WORK IMMEDIATELY EVEN THOUGH HE FELT SHAKY FOR THE REMAINDER OF THE DAY.

THERE'S AN ARTICLE IN THE JOURNAL OF FORENSIC SCIENCES ON ELECTROCUTION, A REVIEW OF 155 CASES WITH EMPHASIS ON HUMAN FACTORS. FIRST AUTHOR MELLEN, M-E-L-L-E-N.

THEY DESCRIBED 165 DEATHS IN THE [646] HIGH-VOLTAGE CATEGORY. EIGHT OF THEM YELLED OUT. SO THEY WERE CONSCIOUS ENOUGH TO YELL OUT AS THEY'RE BEING SHOCKED.

IN AN ARTICLE IN THE IEEE TRANSACTIONS OF EDUCATION FROM 1991 ON MEDICATION ENTITLED "ELECTRICAL SHOCKS" BY THEODORE BERNSTIEN

HE STATES, "SEVERAL ELECTROCUTIONS HAVE TOLD THE AUTHOR OF BEING ON A LADDER WHEN THEY BECAME FROZEN TO THE CIRCUIT. THEY FREED THEMSELVES BY KICKING THE LADDER OUT FROM UNDER THEMSELVES TO ALLOW THEIR BODY WEIGHT TO PULL THEM FREE. THIS IS AN EXAMPLE OF HOW THE MIND IS FUNCTIONING, BUT THE ARM MUSCLES CANNOT BE CONTROLLED VOLUNTARILY. OTHERS HAVE STATED WHEN FROZEN TO THE CIRCUIT, THEY SHOUTED FOR HELP WHILE BYSTANDERS REPORTED. THEY HEARD ONLY A SOUND MORE LIKE A WIMPER."

THE LAST ARTICLE IS "PATTERNS OF HIGH-TENSION ELECTRICAL INJURY IN CHILDREN AND ADOLESCENTS AND THEIR MANAGEMENT." FIRST

AUTHOR IS BURKE, B-U-R-K-E. DISCUSSES 25 JUVENILE PATIENTS WHO WERE EITHER POLE OR TREE-CLAIMING [sic] AND CAME IN CONTACT WITH HIGH-VOLTAGE ELECTRICITY.

STATES, "ALTHOUGH PERMANENT AMNESIA FOR EVENTS SURROUNDING THE INCIDENT WERE RARE, MANY [647] OF THE PATIENTS WERE STUNNED, KNOCKED UNCONSCIOUS OR RETICENT ABOUT THE EVENT."

WHAT'S INTERESTING ABOUT THAT IS IT DOES NOT SAY THAT ALL THE PATIENTS WERE KNOCKED UNCONSCIOUS AND HAD AMNESIA.

MR. NUNNELLEY: OBJECT. MOVE TO STRIKE. THE WITNESS IS EDITORIALIZING. THE ARTICLE SPEAKS FOR ITSELF, AND HE'S READING IT INTO THE RECORD.

THE COURT: OVERRULED.

THE WITNESS: THE REMAINDER OF THE ARTICLES – AND THERE ARE ABOUT 20 MORE – ARE CASES OF – LITERALLY HUNDREDS OF CASES OF SURVIVAL OF HIGH-VOLTAGE INJURY IN SOME CASES, FOR EXAMPLE, BETWEEN THE HEAD AND FOOT – 150,000 VOLTS. YES, THIS ARTICLE. THIS DOES NOT DISCUSS CONSCIOUSNESS, BUT IT'S –

MR. NUNNELLEY: SIR, I DIDN'T KNOW WE WERE GOING BACK TO FURTHER READING OF THE ARTICLES.

THE COURT: LET'S MOVE ON. LET'S MOVE ON.

MR. NUNNELLEY: THANK YOU, YOUR HONOR.

MR. THOMAS: THANK YOU.

BY MR. THOMAS:

Q DR. WIKSWO, BASED ON THOSE STUDIES AND OTHERS LIKE THEM IN YOUR OTHER REVIEW, DO YOU HAVE AN OPINION AS

* * *

Florida Corrections Commission

EXECUTION METHODS
Used by States
Supplemental Report

[LOGO]
June 1997

[LOGO]

Florida Corrections Commission

Members:

[Names And Addresses Omitted In Printing]

June 20, 1997

The Honorable Lawton Chiles
Governor
PL 05
The Capitol
Tallahassee, Florida 32399-0001

The Honorable Toni Jennings
President
The Florida Senate
Suite 405, The Capitol
Tallahassee, Florida 32399

The Honorable Daniel Webster
Speaker
Florida House of Representatives
Suite 424, The Capitol
Tallahassee, Florida 32399

Dear Governor Chiles, President Jennings, and Speaker Webster:

Based upon Florida's recent experiences in the Tafero and Medina executions utilizing the electric chair, the Florida Corrections Commission instructed its staff to conduct an extensive survey of the execution methods used in other

states. The results from that survey and this Commission's recommendations are contained in the Commission's *1997 Supplemental Report on Execution Methods Used by States.*

Surveyed states were asked to describe their execution procedures; composition of the execution team, including any medical personnel; problems encountered during execution; and, any documented costs of execution equipment. If a state had recently changed to lethal injection, they were asked what prompted the change, what method was previously used, and any legal ramifications of the change in methods.

We found that almost all states have written procedures regarding the execution process, and that numerous states had recently changed to lethal injection from electrocution because it was considered to be a "more humane method of execution." While the report notes problems encountered in the past with almost *all* methods of execution, including lethal injection, the Commission recommends that Section 922.10, Florida Statutes, be amended to allow lethal injection as an alternative method of execution, in addition to electrocution, for those persons currently on a sentence of death. Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida.

The Florida Corrections Commission believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and,

just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur.

Respectfully submitted,

/s/ Edgar M. Dunn, Jr.
Edgar M. Dunn, Jr.
Chairman

Florida Corrections Commission

Execution Methods Used by States

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Florida Corrections Commission
Execution Methods Used by States
Introduction

On March 25, 1997, Pedro Medina was executed at Florida State Prison by means of electrocution. During the execution process, flames appeared from under the hood covering the head and smoke filled the chamber. Due to this apparent malfunctioning, the Florida Corrections Commission reviewed the method(s) of execution used by Florida and other states and recorded the problems encountered with these methods.

Following the execution, the Department of Corrections conducted an investigation of the proceedings (Investigation # 97-20953) and determined that the most likely cause of the problem was a corroded copper screen located inside the execution headpiece. Governor Lawton Chiles requested an independent review of the events and hired two experts: Michael Morse, an electrical engineering professor at the University of San Diego, and Jay Wiechert, an electric-chair consultant from Fort Smith, Arkansas. Their findings contradicted the department's findings and found that one of the two sponges located inside the execution headpiece was dry and had not been soaked in a saline solution. This reduced the flow of electricity which heated the wet sponge and consequently caused the dry sponge to catch on fire. Appendix A contains the reports submitted by Mr. Morse and Mr. Wiechert. It should be noted that the four pathologists assigned to conduct an autopsy of Pedro Medina stated that he was killed instantly from the electrocution and prior to the onset of the fire.

This malfunctioning has effected [sic] other Florida scheduled executions. Leo Jones' execution, scheduled for April 18, 1997, was stayed pending a hearing and ruling in circuit court of Judge A.C. Soud on the issue of Florida's electric chair's effectiveness. Although Judge Soud ruled on April 21, 1997, that the electric chair is not "cruel and unusual punishment" and that the malfunctioning was due to "unintentional human error," the Florida Supreme Court granted an indefinite stay pending a hearing in that court on May 6, 1997, to hear arguments over Judge Soud's ruling. The Florida Supreme Court subsequently granted Gerald Stano, who was scheduled to be executed on April 29, a stay until at least May 30, pending the results of the May 6 hearing.

In May the Florida Supreme Court ordered a new hearing because information related to the state's execution protocol was not heard at the April trial, and the trial did not allow sufficient time to hear experts for the defense which would have countered the state experts' testimony concerning Medina's execution. The new hearing will be conducted in July, again by Judge Soud, and will return to the Florida Supreme Court in September. Leo Jones won a stay until at least September 15. The Florida Supreme Court also ordered that Leo Jones' experts be allowed to examine the state's electrocution equipment, and that they also be allowed to view the testing of the equipment by prison officials. The test will be conducted on June 30.

Appendix B contains a number of editorials published in Florida's newspapers regarding Florida's execution method.

The Death Penalty in Florida

Florida has electrocution as its only method of execution. The electric chair was constructed in 1923 when electrocution became the official method of capital punishment as authorized by the Florida Legislature. Prior to that date, executions were carried out by counties, usually by hanging. The chair was originally located at Union Correctional Institution, but was moved to Florida State Prison in 1962. Frank Johnson was the first inmate executed in the electric chair in Florida on October 7, 1924.

On June 29, 1972, in *Furman v. Georgia*, the U.S. Supreme Court struck down the death penalty in the United States. At that time, Florida had not carried out an execution since May 12, 1964. The death sentences of 95 men and one woman were commuted to life in prison as a result of the *Furman* decision. The Florida Legislature revised the death penalty statutes in December 1972 (F.S. 921.141). These statutes were upheld by the U.S. Supreme Court on July 2, 1976 in *Proffitt v. Florida*. John Spenkelink was the first Florida inmate executed in the post-*Furman* era on May 25, 1979. To date, 234 inmates have been executed in the electric chair, thirty-nine since the reinstatement of the death penalty in 1976. Florida has carried out nine triple executions, three quadruple executions and twenty-one double electrocutions. No multiple executions have been carried out in the modem era. No woman has been executed in the electric chair.

Two recent executions encountered problems: Jesse Tafero on May 4, 1990, and Pedro Medina on March 25, 1997. During both of these executions, flames erupted under the headgear. Incorrect use of sponges in the headgear

were ultimately blamed for the problems with both of these executions. For the Tafero execution, a synthetic sponge, which was substituted for a natural sponge, ignited. In the Medina execution one of the two sponges located inside the execution headpiece had not been soaked in a saline solution. This reduced the flow of electricity which heated the wet sponge and consequently caused the dry sponge to catch on fire.

Currently, there are 380 inmates on death row in Florida: 374 men (219 white, 135 black, 20 other) and six women (4 white, 2 black). Fifty-four of these men are housed at Florida State Prison; 320 are housed at Union Correctional Institution. The six women on death row are housed at Broward Correctional Institution. The death chamber is located at Florida State Prison.

The electric chair used in Florida is a three legged oak chair constructed by inmates and is known as "Old Sparky." Executions usually take place at 7:00 a.m. Administrative shift change occurs at 8:00 a.m. By scheduling executions for 7:00 a.m., the institution is quieter and more secure. Inmates are already in lock-down.

At the time of the Medina execution, there were no written procedures for the execution process. According to testimony documented in the Department of Corrections Investigation # 97-20953, the procedure has been passed down from "generation to generation." From this report and the Department's Public Information Office, the following is the execution process: approximately one hour prior to an execution, the inmate's head and right calf are shaved. Also, a patch on the chest is shaved for the placement of a stethoscope. The inmate then showers and

returns to the holding cell, which has been stripped of all belongings. The superintendent reads the death warrant and an electrolytic gel is applied to the inmate's head and right calf. The inmate is lead [sic] into the death chamber and is strapped into the electric chair. Chin, chest, arm, wrist, waist, and leg straps are secured. A metal headpiece covers a leather hood. The hood, made at the prison, is lined with wool, and has a bronze rod with a copper wire mesh screen brazed to it on the inside. It also covers the inmate's face. A natural sponge is sewn with cotton twine onto the copper screen. Natural sponges, which have been soaked overnight in salt water, are placed at the contact points in the headgear and the leg.

The executioner is a private citizen who is paid $150 in cash. The executioner is present in the death chamber behind a screen. Information concerning the executioner and the execution team is confidential. The electricity for executions is provided by the institution's emergency generator. According to the Florida Department of Corrections, "(t)he electrocution cycle is two minutes or shorter in duration. During the cycle voltage and amperage levels peak on three occasions. Maximum current is 2000 volts and 14 amps." Florida Statutes Chapter 922.06-922.15 cover executions. The Department of Corrections has drafted written procedures since the Medina execution.

Executions in the U.S. – A Brief History

In the late nineteenth century, with the development of state penal institutions and the centralization of penal

authority within the various states, there was a movement from local to state administration of capital punishment. This transition to state authority evolved slowly from the first state-imposed execution in Vermont in 1864 through the 1880s. Most of the change occurred between the 1880s and the 1910s. (As late as 1955, four states left executions to the local authorities: Mississippi, Louisiana, Delaware, and Montana.)

Up to that time, hanging had been the predominant method of execution. Hanging had been brought to America from England by the early settlers. In 1967, two sociologists estimated that some sixteen thousand people had been executed by hanging in America. It was inexpensive and easily carried out. However, it could also be very painful, requiring up to twenty minutes for a prisoner to strangle to death. Some were decapitated. In the late nineteenth century, the "long drop" was introduced. This method of hanging uses a formula which determines the length of the rope to be used based on the weight of the prisoner. The fall is made long enough to break the prisoner's neck so that he will die almost immediately.

Despite improvements in the method, hanging fell out of favor in most jurisdictions. Many bungled executions were reported and hanging became associated with illegal lynchings. Also, the centralization of capital punishment facilitated the use of such methods as electrocution and lethal gas that were not feasible at the local level. Three states, Delaware, New Hampshire, and Washington, currently provide for hanging as an option. Since 1977, three inmates have been executed by hanging: two in Washington, and the last, in 1996, in Delaware.

In 1888, New York became the first state to adopt electrocution as its method of execution. William Kemmler was the first man executed by electrocution in 1890. Eventually twenty-six states adopted electrocution as a "clean, efficient and humane" means of execution. Today, six states retain electrocution as their only method; five others offer it as an option. It is the second most common method of execution utilized in the modern era (1977-1997).

Utah had provided for death by firing squad since territorial days in 1854 (along with hanging and beheading). Nevada also gave inmates the choice of the firing squad or hanging beginning in 1911. Only one inmate was ever executed by shooting in Nevada (in 1913 by an "execution machine" consisting of three pre-aimed rifles) before the state switched to lethal gas. Shooting was also the penalty imposed by the military for deserters in time of war, but has only been used once since the Civil War (Private Eddie Slovik, 1945). Three states (Utah, Idaho, and Oklahoma) provide for execution by firing squad today. Since 1977, there have been only two executions by firing squad, both in Utah, the last in 1996.

Nevada was the first to adopt lethal gas in 1921. In 1924, Gee Jon was the first man to die in the gas chamber. Lethal gas was seen as an improvement over hanging, firing squad, and electrocution because it was less violent and did not disfigure or mutilate the body. Eleven states adopted lethal gas, including three that had previously used electrocution. Six states currently have statutes providing for lethal gas, although none retain it as their only method. Nine inmates have been executed by lethal gas in the modern era, the last in 1994 in North Carolina.

In the post World War II years a number of factors contributed to a growing movement against the death penalty including revulsion at atrocities witnessed during the war; the burgeoning civil rights movement; attempts by the ACLU and the NAACP Legal Defense Fund to appeal death penalty cases; its abolition in a [sic] an increasing number of Western countries; and, a weakening in public support for the death penalty. During the 1950s and 1960s, ten states (Alaska, Hawaii, Delaware, Oregon, Iowa, Michigan, West Virginia, Vermont, New York and New Mexico) abolished the death penalty joining Wisconsin, Minnesota, and North Dakota, which had abolished the death penalty prior to 1920. The rate of executions began to steadily decline beginning in 1951. By 1968, exeeutions had stopped.

One of the first cases in which the U.S. Supreme Court recognized a capital defendant's right to protection under the "due process" clause of the Fourteenth Amendment was in 1932. In *Powell v. Alabama,* the Court insisted that counsel be provided for all capital defendants. Other decisions ruled against racial discrimination in jury selection (*Patton v. Mississippi,* 1947) and coerced confessions (*Fikes v. Alabama,* 1957). *Shepard v. Florida* (1951) and *Hamilton v. Alabama* (1961) clarified and extended the rulings in *Powell* and *Patton* and all "typically involved the rights of black defendants in southern trial courts." Later attacks were made against the death penalty on Eighth Amendment grounds against "cruel and unusual" punishment. In 1969 in *Boykin v. Alabama* (which argued that the death penalty for robbery was infrequent, arbitrary and discriminatory) and in 1970 in *Maxwell v. Bishop*

(which argued against finding of both guilt and punishment in one proceeding), the Court avoided the constitutional issue by sending these cases back to state courts on due process grounds. In 1971, the NAACP Legal Defense Fund brought the cases of Earnest Aikens, William Furman, and Lucious Jackson, two murderers and a rapist, before the Court, again, on the discriminatory and capricious way, the death penalty had been imposed. During the Court's deliberation, Aiken's death sentence was nullified when the California Supreme Court ruled in *People v. Anderson* that capital punishment was unconstitutional under that state's prohibition against cruel and unusual punishment, leaving *Furman v. Georgia* as the lead case. (New Jersey's supreme court had also nullified that state's death penalty prior to the *Furman* decision.)

On June 29, 1972, the Supreme Court ruled in *Furman v. Georgia* and related cases "that the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Justices Brennan and Marshall held that the death penalty, whatever its statutory form, was cruel and unusual. The remaining three justices in the majority, Douglas, Stewart, and White, more narrowly defined their objection: current statutes allowed for too much discretion by juries and the punishment was applied so infrequently and in such an unpredictable manner that it was likened to being struck by lightning. Infrequent application would fail to act as a deterrent and thus, compared to other available punishments, did not serve a justifiable purpose. The Court reversed the death sentence of some 120 cases. The *Furman* decision invalidated the death-sentencing schemes in

thirty-two states and the District of Columbia and affected some 629 death row inmates nationwide. Generally, these inmates had their sentences commuted to life or other long term sentences by the governors of the various states.

According to Adam Bedau (an anti-death penalty advocate):

> Within a year after *Furman*, commissions had been formed in several states to make recommendations on the issue, and bills to restore capital punishment had been introduced in three dozen legislatures. By midsummer, such bills had already been signed into law in twenty states. On the second anniversary of *Furman*, twenty-eight states had new death penalty legislation and more than 100 persons in seventeen states had been sentenced to death under these new laws.

By 1976, thirty-five states had enacted new death penalty statutes and these cases had made their way to the U.S. Supreme Court. On July 2, the Court ruled in *Gregg v. Georgia* that "the punishment of death does not violate the Constitution" provided that "guided discretion" is exercised in imposing the penalty, and allowed capital punishment to resume after a decade-long moratorium on executions. On that same date, the Court upheld the new death penalty statutes in Florida *(Proffitt v. Florida)* and Texas *(Jurek v. Texas)*, but struck down those in North Carolina *(Woodson v. North Carolina)* and Louisiana *(Roberts v. Louisiana)* which provided for mandatory death sentences. Of the statutes passed that were ultimately upheld by the Supreme Court, all contained provisions for automatic appellate review of death sentences.

Later, the death penalty statutes in New York and Massachusetts were declared unconstitutional by their state supreme courts. After the *Anderson* decision, California passed a constitutional amendment allowing for the death penalty. In 1977 in *Coker v. Georgia,* the Supreme Court ruled that rape of an adult woman did not warrant the death penalty. In the four years between the *Furman* and the *Gregg* decisions, over 600 prisoners were sentenced to death. Six months after *Gregg,* in January 1977, Gary Gilmore became the first person executed under the post-*Furman* statutes.

At the time executions in the United States resumed, many states had not executed anyone for over twenty, sometimes thirty, years. Previously used equipment, such as electric chairs and gas chambers, were old, needed expensive repairs, and had experienced problems in the past. Also, many states felt that a modern technique embodying the latest methods was needed. Lethal injection had first been proposed in 1888 when New York considered it but ultimately opted for electrocution. In 1977, Oklahoma became the first state to adopt lethal injection. Texas performed the first execution by lethal injection in 1982 with the execution of Charlie Brooks. To date, sixteen states have lethal injection as their only method of execution; sixteen others provide for it as an option. It is by far the most common method employed, with over 246 inmates put to death by lethal injection since 1982.

Appendix D contains a list of courts and cases upholding lethal injection as a method of execution.

Methods Of Execution By State

A report compiled by the Bureau of Justice Statistics, *Capital Punishment 1995,* and a telephone survey conducted April 1997 by the Staff of the Florida House of Representatives, Committee on Corrections, indicate that of the fifty states and the District of Columbia, thirty-eight states have a death penalty and differing methods of execution: lethal injection (32), electrocution (11), lethal gas (6), hanging (3), and firing squad (3). Several states have more than one method of execution. Twelve states and the District of Columbia have no capital punishment. See Appendix E, "Methods of Execution by State."

According to information from the Bureau of Justice Statistics and the NAACP Legal Defense Fund, there are over 3,000 prisoners under the sentence of death. Over 40 percent of these prisoners reside on death rows in California, Texas, and Florida. See Appendix F "Prisoners Under Sentence of Death."

Since the *Gregg* decision of 1976, as of June 15, 1997, 394 executions have been conducted. From 1977 to 1997, the lethal injection method has comprised the greatest percentage of all executions at 62.44%. Lethal injection is followed by electrocution at 34.01%; gas chamber at 2.28%; firing squad at 0.51%; and hanging at 0.76%. It is interesting to note that from 1977 to 1990 electrocution was the most prevalent method at 59.44% followed by lethal injection at 35.66%; but from 1991 to 1997 lethal injection leads at 77.69% followed by electrocution at 19.52%. See Appendix G "Executions in the U.S. 1976-1997."

Appendix H contains a list of death penalty information sources available on the Internet which provide both national and Florida death penalty statistics.

Survey of States

Methodology

Between April 7 – April 18, 1997, staff of the Florida Corrections Commission conducted a telephone survey of seventeen selected states to discuss their chosen method(s) of execution. Although some states have the statutory authority to use lethal gas, firing squad and/or hanging, the survey focused on states using lethal injection and electrocution. Currently, thirty-two states allow for execution by lethal injection and eleven use electrocution. Sixteen states provide for two or more methods of execution. Generally, the surveyed states were selected because: (1) the high number of inmates executed by lethal injection; (2) recent changes in statutes to provide for execution by lethal injection; and, (3) use of electrocution. Table 1. details the states surveyed and the reason for their inclusion.

Table 1.

State	Reasoned Surveyed
Alabama	Uses electrocution as its only method of execution.
Arkansas	High number of inmates executed by lethal injection. Provides for both electrocution and lethal injection.
Connecticut	Recently amended statutes providing for lethal injection as its only method of execution. (No executions to date.)
Georgia	Uses electrocution as its only method of execution.
Illinois	High number of inmates executed by lethal injection.
Indiana	Recently amended statutes providing for lethal injection as its only method of execution. (One execution by lethal injection to date.)
Kentucky	Uses electrocution as its only method of execution.
Missouri	High number of inmates executed by lethal injection.
Nebraska	Uses electrocution as its only method of execution.
New York	Recently adopted the death penalty; chose lethal injection.
Ohio	Provides for both electrocution and lethal injection. (No executions by lethal injection to date.)

Oklahoma	High number of inmates executed by lethal injection. Provides for both electrocution and lethal injection. First state to adopt lethal injection as its primary method of execution.
Pennsylvania	Recently amended statutes providing for lethal injection as its only method of execution. (Two executions by lethal injection to date.)
South Carolina	Provides for both electrocution and lethal injection. Recently amended statutes to provide lethal injection as an option.
Tennessee	Uses electrocution as its only method of execution.
Texas	High number of inmates executed by lethal injection. First state to execute an inmate by lethal injection.
Virginia	High number of inmates executed by lethal injection. Provides for both electrocution and lethal injection.

The surveyed states were asked to describe their execution procedures and if those procedures were in writing; composition of the execution team, including any medical personnel; problems encountered during executions; and, any documented costs of execution equipment. If the state used lethal injection, either as its only method of execution or as an option, they were asked what prompted the change, what method was used previously, and any legal ramifications of the change in methods. Detailed information obtained from each state surveyed is contained on pages 14 through 28.

States using lethal injection not included in the survey (followed by the number of executions by lethal injection to date) are: Arizona (6), California (3), Colorado (0), Delaware (7), Idaho (1), Kansas (0), Maryland (1), Mississippi (0), Montana (1), Nevada (5), New Hampshire (0), New Jersey (0), New Mexico (0), Oregon (2), South Dakota (0), Utah (3), Washington (0), and Wyoming (1).

Highlights of Survey

- Almost all states surveyed have written procedures regarding the execution process.
- Electric chairs were built by either inmates or an outside contractor.
- States using the electric chair use natural sponges soaked in a brine (not just saline) solution. Prevalent use of copper devices in headgear, but ranges from mesh, to solid, to perforated devices.
- Most common reason stated for change from electrocution to lethal injection was that it is considered "more humane method of execution."
- All states surveyed utilizing lethal injection as a method of execution administer the drugs manually and do not utilize a machine. States cited the possibility of malfunctioning machinery as the reason why drugs are administered manually.
- Most commonly used drugs for the lethal injection procedure are sodium pentothal (puts the inmate to sleep); second, pancurium bromide (stops respiration); and, third, potassium chloride (stops the heart). Usually between each drug a saline wash is used.
- Virginia has a mandatory 10 mg. intramuscular injection of Thorazine because the inmate is more relaxed and it makes it easier for the technician to insert the IV. Other states offer a sedative injection as an option.

- Composition of the execution team: most teams are comprised of department of corrections personnel; however, Arkansas uses community-based medical personnel in its lethal injection procedure. Team members are either voluntary or appointed. Several states cited screening and evaluation of members, post-execution debriefing sessions, and the availability of counseling.

- States cited the need for statutory provisions regarding protection of medical personnel from censure from professional associations with regard to their involvement in the execution process.

Problems Encountered

Michael Radelet, chairman of the University of Florida Sociology Department maintains a list of "Post-Furman Botched Executions" which is posted on the internet (See Appendix l). As of June 15, 1997, twenty-two executions which encountered problems during the execution process are listed. Of the twenty-two executions, thirteen related to lethal injections; eight related to electrocution; and one related to the gas chamber. Texas has seven; Virginia, Florida, Alabama, Oklahoma, and Indiana have two each; Mississippi, Georgia, Arkansas, Illinois, and Missouri each had one. Florida's two executions included were: Jesse Joseph Tafero on May 4, 1990, and Pedro Medina on March 25, 1997. Although most states contacted confirmed the above problems, Texas and Georgia stated that they had encountered no problems in their respective executions. Table 2. Depicts the percentage of problematic executions to total executions from 1977 to 1997.

Table 2.

Problematic Executions 1977-1997

	Lethal Injection	Electrocution	Gas	Firing Squad	Hanging	Total
Number Executed	246	134	9	2	3	394
Number Problematic	13	8	1	0	0	22
% Problematic	5.28%	5.97%	11.11%	0.00%	0.00%	5.58%

Source: Compiled from "Executions in the U.S. 1976-1997," Death Penalty Information Center and "Post-Furman Botched Executions" as of June 15, 1997.

Problems encountered with the process of lethal injection dealt with the:

- Difficulty of locating a viable vein to establish the intravenous connection
- Violent reaction to lethal drugs
- Tightness of leather straps which prevented the flow of chemicals into the veins
- Lethal drugs clogged the tube and stopped the process, and the clogged tube had to be replaced.

Problems encountered with the process of electrocution dealt with:

- Burning of varying degrees of parts of the body
- First jolt of electricity not sufficient to kill.

Details of Survey of States

Alabama

Has electrocution as its only method of execution. Has had a bill introduced during previous legislative sessions to give inmates currently on death row the option of lethal injection and having lethal injection as the only method for those sentenced after the bill becomes law. There is no sponsor currently for that legislation and Department of Corrections is not lobbying for it.

The electric chair was first used in 1927 and was built by inmates. There have been 167 executions in the chair. The headgear is also believed to be "homemade." The

electrical components were updated in 1991 for approximately $26,000 by Jay Wiechert, an electrical engineer from Fort Smith, Arkansas (and the expert brought in by Governor Chiles to review the Medina execution). The headgear is leather with a copper screen and natural sponge, soaked in brine, sewn in. A single leg electrode is place on the inmate's left leg. A cloth mask is placed over the inmate's face last. A single switch is used to apply the current. An electrical engineer is contracted to check out the equipment before each execution. Confidential procedures available to criminal justice agencies on request. Alabama reported difficulties with their first post*Furman* execution in 1983. A heartbeat was detected after the application of the first cycle and another cycle was administered. Corrections officials believe they simply did not wait long enough before checking for a heartbeat.

The warden is responsible for assembling the execution team. (No further information was available on this matter.)

The death chamber is located at Holman Prison and death row inmates are housed at Holman Prison and Donaldson Correctional Facility (males) and Julia Tutwiler Prison for Women (females). Death row inmates were first housed at the Donaldson facility when the number of death row inmates exceeded the available space for them at Holman.

There have been sixteen executions since 1977 to June 15, 1997.

Arkansas

Has the option of lethal injection or electrocution. For offenses committed after July 4, 1983, lethal injection is the only method of execution; for offenses committed prior to that date the inmate may choose either method. Since change in law, some inmates have chosen the electric chair. Change in law because lethal injection option considered more humane. Inmates must choose method seven days prior to execution and method chosen is documented.

Have written procedures for both lethal injection and electrocution. Confidential procedures available to criminal justice agencies on request.

Death house is used for both methods of execution and is located at the Cummins Unit. This institution houses maximum, medium, and minimum security inmates. Housing for death row inmates is located at another institution. The inmate is transferred to the Cummins Unit within 72 hours prior to the execution.

State has had multiple executions on same night on several occasions. Executions are conducted on the same day because it is considered easier on staff.

Execution Team has three components:

1. Administrative Staff – director, warden of institution, executive staff.
2. Tie-Down and IV team – tie down team consists of volunteer Department of Corrections correctional officers who retrieve, escort, and secure inmate on gurney or execution table. IV team consists of volunteer community-based medical personnel qualified to

insert IV lines or perform cut-down (surgical incision to locate a vein) procedures.

3. Institution Staff to provide security lock-down – warden's staff.

Lethal Injection:

Department of Corrections Medical Administrator purchases IV lines, drugs, other medical materials and supplies. This position also packages lethal drugs for use in execution and is then kept under lock and key. Drugs used are based on University of Texas School of Pharmacy research to find most effective and quick-acting agents.

Three agents used in a sequence in specific concentration for shutdown of body.

1. Sodium Pentothal – induction agent renders inmate unconscious and shuts down respiratory and cardiac; toxic amounts but not lethal
2. Sodium Chloride wash – to wash sodium pentothal out of IV line
3. Pancuronium Bromide "Pavulon" – paralytic curare – smooth muscle paralytic, shuts down respiratory – toxic but not lethal
4. Sodium Chloride wash – to wash pancuronium bromide out of IV line
5. Potassium Chloride – electrolyte which reverses polarity of heart muscles – shuts down heart

Drugs are administered in a sequence – not one mix. Some of the drugs cannot be mixed because they will

crystallize and subsequently will not be effective. The example of John Gacy's execution in Illinois was described in which a single line was used. Sufficient wash was not used between drugs and the drugs crystallized which in effect stopped the process.

Do not use a machine because of possibility of malfunctions. Two separate IV lines are inserted into inmate. IV Team insert IVs but executioner actually administers drugs and executioner identity unknown. Team in execution chamber is in a locked room can see out but no one can see in. Execution chamber contains controls for electrocution and for lethal injection devices. Executioners are in executioners' room well in advance to execution, and have private meeting with Medical Administrator prior to execution. Use a standard hospital gurney with three to four inch pad with extended arm. On lethal injection, use leather gauntlets of generic size to secure fingers, palms, wrists. Medical Administrator wears low-frequency headset and stands next to condemned man. Headset allows for communication with executioner and can direct which IV line to use if problems arise. Have EKG monitor to establish flatline on inmate and use coroner to determine death.

Have extensive rehearsal within two to three weeks of execution including all participants. Have two rehearsals with a volunteer officer of same approximate weight and height of inmate who is instructed to "cause trouble" in the rehearsal. After execution have debriefing and counseling is also made available.

Electrocution:

Use stout salt solution and disc of copper – solid copper concave device three inches in diameter which is soldered to top of headpiece; use sponges which extend beyond copper device. Headpiece and chair built by inmates or DC.

Have legislation which states any medical personnel involved "cannot be disciplined by any licensing board." Also prohibits identification of executioner or anyone not governed by policy.

There have been fifteen executions from 1977 to June 15, 1997; thirteen by lethal injection and two by electrocution.

Connecticut

Connecticut changed method of execution from electrocution to lethal injection effective October 1, 1995. Currently they are drafting written procedures for lethal injection method. Connecticut has reviewed lethal injection procedures from half dozen other states and visited North Carolina, Arizona, Arkansas, Delaware, and Texas. The change does not allow for an option for inmates sentenced to death prior to the effective date.

No one has been executed since the 1960s. The electric chair is scheduled to be placed in a museum. Used leather cap/straps with chair. Chair was made in early 1900s.

Next scheduled execution most likely within one year since appeals almost exhausted.

Daniel Webb, inmate, has filed appeal based on change from electrocution to lethal injection.

Execution team will be composed of all DC personnel. All personnel will be voluntary, and then screened and interviewed. Lethal injection will be administered via IV; staff to be trained in medical procedure; DC physician on board to monitor EKG.

Drugs used will be three drugs: sodium pentothal, saline solution, followed by pancuronium bromide "Pavulon," saline solution, and then followed by potassium chloride.

Georgia

Electrocution is the only authorized method of execution.

The original electric chair was built in 1938 by inmates and is in a museum. The execution chamber and electric chair utilized now were built by inmates in 1976. The electric chair has a headband; the electrode makes contact with one sponge. The electrical components were purchased from a firm in Arkansas.

Electrical equipment was also purchased to conduct tests on the electric chair to ensure that it functions properly. Several tests are conducted prior to an execution.

The membership of the Execution Team is confidential and ranges from six to nine members. The members of the Execution Team are internal to the agency and the members are compensated $100 each. The Execution Team practices a range of potential inmate scenarios to

ensure that they are prepared and that each execution proceeds according to plan.

Georgia has an execution manual that details the process, procedures, and steps associated with executions; however, the contents of the manual are confidential.

No problems were reported with any executions.

There have been twenty-two executions from 1977 to June 15, 1997.

Illinois

Has lethal injection as only method of execution. Prior to change in method used the electric chair. Has written procedures which are confidential, but available upon written request from other correctional agency.

Execution Team consists of two teams: one of security staff; other for prior to execution. All teams composed of volunteers. The executioner is known only to director/warden. All staff involved on teams attend a debriefing after execution.

Used machine to administer drugs for lethal injection three to four years ago, but switched to manual push due to possibility of problems with machines.

Use three drugs with saline washes between drugs: sodium pentothal, saline solution, followed by pancuronium bromide, saline solution, and then followed by potassium chloride. All doses are administered in lethal dosage amounts. Two IVs are inserted: primary and secondary. The IVs are started prior to opening the curtains

for witnesses. There is a direct line from executioner chamber to inmate.

In prior use of electric chair, two doses of electrical power were administered. Used natural sponges.

State statutes restrict professional medical associations from censuring medical personnel involved in executions. In the past, the AMA has lobbied to delete this provision from the statutes.

There have been eight executions from 1977 to June 15, 1997, all using lethal injection.

Indiana

Indiana changed the method of execution from electrocution to lethal injection effective July 1, 1995. Discussion with the Public Information Officer of the Indiana Department of Corrections (IDOC) indicates that the state changed its method because lethal injection is viewed as a more humane method of execution, but more importantly, is less stressful on the staff involved in the execution. The change did not allow for option; even those cases prior to effective date of law will be executed by lethal injection. Indicated that there are cases pending regarding the use of lethal injection as "cruel and unusual punishment." Death warrant had to be modified to indicate lethal injection as method of execution instead of electrocution.

The methodology of the lethal injection process is patterned after Illinois' methodology. Initial costs involved the renovation of the execution room. IDOC has written procedures on the process, but the procedures are confidential.

Execution Team composed of approximately fifteen people, all volunteer IDOC personnel composed of correctional officers and medical staff. All receive extensive training, and a psychological evaluation prior to placement on team, and may leave the team upon their request.

A catheter is inserted into each arm with IV attached in which three drugs are administered in sequential order: sodium pentothal, saline solution, pancuronium bromide, saline solution, potassium chloride.

Tape available which shows execution chamber prior and after change in execution method.

There have been four executions from 1977 to June 15, 1997; three by electrocution; one by lethal injection.

Kentucky

Electrocution is the only authorized method of execution. The last execution was in 1962, although one execution is tentatively scheduled for July 1, 1997. Legislation proposing the use of lethal injection as an optional method of execution has been drafted, and a special session of the Kentucky Legislature may occur in the fall.

All male inmates under sentence of death are housed at Kentucky State Penitentiary. All female inmates under sentence of death are housed at the Kentucky Correctional Institution for Women. The electric chair is located at Kentucky State Penitentiary.

No later than twenty-four hours prior to the time of execution, any inmate sentenced to death is transferred

from Death Row to a special housing unit located at the Kentucky State Penitentiary adjacent to the electric chair.

The electric chair was built by inmates in 1911; however the electronics were replaced in the 1950s. The electronics will be replaced again prior to the execution tentatively scheduled for July 1, 1997.

The identities of the members of the Execution Team are confidential and known only to select staff. The Execution Team consists of twelve persons internal to the Department of Corrections and has no members that are external to the agency. The warden selects three of the twelve member Execution Team to participate in an execution. The members of the Execution Team are from other institutions that do not house death row inmates to reduce the likelihood of a correctional officer participating in the execution of an inmate he/she previously had contact with. Members of the Execution Team are not compensated.

Louisiana

Has lethal injection as only method of execution; switched from electric chair in 1991 because it is considered more humane.

Last execution by electric chair conducted in 1991. Worst problem encountered was a third degree burn on right leg during an electrocution. Procedures required a certified electrician on premises during execution. Used a cloth mask over head, sponges on head and right leg, and a leather headpiece. Electric chair will be put in museum.

The last lethal injection execution had difficulties finding a vein. Stated that there are no written procedures. Machine not used in procedure, manual push used. Executioner administers drugs. Medical personnel (not doctors or nurses but most likely emergency medical technicians) in chamber. DC medical personnel selected by warden, although they do not have to be on execution team if they do not want to. Personnel rotated for each execution. Medical personnel tell executioner how to administer injections. Warden remains in execution chamber with inmate; executioner in a separate room that has a one way mirror. Curtains are drawn in execution room during preparation – witnesses don't see inmate until inmate is prepped completely. An IV is inserted in both arms; if needed can insert an IV in ankle.

Three drugs are administered in sequential order: sodium pentothal, saline solution, pancuronium bromide, saline solution, potassium chloride. Each drug is administered in a lethal amount. Process takes approximately five to seven minutes; all executions conducted at 12:01 midnight.

ABC *Prime Time Live* tape available.

There have been twenty-four executions from 1977 to June 15, 1997; twenty by electrocution and four by lethal injection.

Missouri

In 1988, legislation was passed that gave the Director of the Department of Corrections the discretion to use either the gas chamber or lethal injection. Since the first

execution by lethal injection in 1989, Missouri has executed twenty-four inmates, all by lethal injection. (Prior to 1989, Missouri's last execution had been in 1965.) Written procedures for executions are considered confidential. Missouri estimates that the cost of an execution is approximately $6,300. The majority of those costs are associated with overtime paid to staff. The costs of drugs used are estimated to be $175. Until two years ago, Missouri used a lethal injection machine. They have since switched to manual push because it was easier to use than the injection machine.

Execution procedure: Inmates are given the option of receiving a sedative by injection prior to the execution. The "executioners" (two at each execution) are Department of Corrections employees. A contracted, "trained medical professional" inserts an IV line and a saline drip is started. The IV line leads into tubing, which in turn is run into an adjoining room. The executioners cannot see the inmate. One executioner manually pushes the drugs into the IV line; the other executioner releases a clamp which releases the drugs. Drugs used, in order, are sodium pentothal, pancurium bromide, and potassium chloride.

Executions by lethal injection are carried out at Potosi Correctional Center, where death row inmates are also housed. The gas chamber is at Jefferson City Correctional Center. For all practical purposes, the gas chamber is no longer used and would be very expensive to repair.

There have been twenty-four executions from 1977 to June 15, 1997, all by lethal injection.

Nebraska

Has electrocution only; lethal injection considered in past, but currently no changes are being considered.

Original electric chair was built in early 1900s. In 1945 the electrical components (transformer, etc) were upgraded. Use copper electrodes; sea sponges soaked in brine. Copper headpiece similar to a fan blade – eight perforated blades round in shape sits on head; oval shape copper piece placed on leg. Headpiece is constructed of leather with leather straps.

Personnel assigned to the execution team by the warden/director and the same people are used every time. Same location for execution chamber and death row. Close to execution date, inmate kept in hospital at institution and transported to basement (execution chamber) on day of execution.

Have confidential written procedures. The last execution was conducted in July 1996. Electric chair maintained by outside contract; test working order of equipment by boiling water in barrel for one minute.

There have been only two executions from 1977 to June 15, 1997. The worst reported problem encountered during an execution was a small blister on calf of leg and state did not experience any problems with head burns.

New York

Reinstated the death penalty effective September 1, 1995. Lethal injection is the only method authorized. Lethal injection was chosen as the method of execution by a conference committee of representatives from the

state assembly, state senate, and governor's office when the death penalty bill was being formulated. There was no testimony or evidence presented, nor controversy over choosing lethal injection. No executions have been carried out to date.

Ohio

Have option of lethal injection or electrocution. Inmate chooses method seven days prior to execution. If none chosen, method defaults to electrocution. Law was changed effective July 2, 1993, by State General Assembly. No specific case was cited for reason for change. Have not had an execution since 1963.

Oklahoma

Lethal injection is the authorized method of execution since the death penalty was reinstated in 1976. However, Section 1014, Oklahoma Statutes, authorizes electrocution should lethal injection ever be held unconstitutional and the use of a firing squad should both lethal injection and electrocution ever be held unconstitutional. The state's decision to switch from electrocution was not related to any problems or a specific case.

Statutes are not highly prescriptive regarding the composition of the Execution Team. The statutes authorize the Warden to select three volunteers to administer the drugs into the intravenous lines after the two IVs (one in each arm) have been inserted by medical staff. The three selected volunteers are not required to be medically trained, nor are they required to be internal to the agency.

The volunteers' identities are hidden by hoods being worn and their identities are known only to the Warden and the Unit Manager. Each volunteer is paid $300.

The administration of the drugs is done manually because Oklahoma determined that a machine was prone to mechanical problems. The drugs are injected by hand held syringes sequentially into the IV lines, alternating between the two lines. The sequence of drugs is in the order listed below. Saline is also injected into the line after each drug is injected. Each of the three executioners injects one of the drugs.

Three drugs are administered: sodium thiopental; pancuronium bromide; and potassium chloride.

The Death Row population is 136 (132 men and 4 women). Men are held at Oklahoma State Penitentiary in McAlester and women are held at Mabel Bassett Correctional Center in Oklahoma City, Oklahoma. All executions take place at the Oklahoma State Penitentiary in McAlester, Oklahoma.

Oklahoma has conducted nine executions since 1977, with the first occurring in 1990, all by lethal injection.

Pennsylvania

Lethal injection is the only method authorized. Pennsylvania has executed two inmates by lethal injection since statutes were changed c.1994-95 and have reported no problems. The state had previously used electrocution, but had not performed an execution since 1963 and were afraid of equipment failure because of the age of the equipment and problems experienced in the past. Written

procedures for executions are considered confidential. The estimated costs of drugs used is between $200-$300. Costs in Pennsylvania may run slightly higher than in other states because drugs are purchased in bulk and often expire before use.

Execution procedure: The "executioners" (two at each execution) are citizen volunteers. The executioners are paramedics, trained as IV technicians and are capable of performing cut downs, if necessary. The executioners insert an IV line into each arm and a saline drip is started. The IV lines are run into an adjoining room, separated from the death chamber by a two-way mirror. The executioners manually push the drugs into the IV line. Drugs used, in order, are sodium pentothal, pancurium bromide, and potassium chloride. The IV lines are flushed with saline solution between the administration of each of the drugs to avoid clogging the lines. Death is determined by visual observation.

Pennsylvania patterned their procedures after visiting and observing the methodology used in Texas. Executions are carried out at the State Correctional Institution at Rockview. Death Row inmates are housed at three other institutions. It is easier on staff if they do not personally know the condemned inmate.

Two inmates have been executed from 1977 to June 15, 1997.

South Carolina

Statutes were revised in 1994 to add lethal injection as a means of execution and allow condemned persons

the right to choose their method of execution in order to be more humane. All condemned persons now have to choose the method of their execution within thirty days of the scheduled date of their execution. For those condemned persons that refuse to choose and were sentenced before January 1995, the method of execution shall be electrocution; however, for those condemned persons that refuse to choose and were sentenced after January 1995, the method of execution shall be lethal injection.

The state's decision to switch from electrocution was to be more humane and was not related to any problems or a specific case.

The identities of the members of the Execution Team are confidential and known only to select staff. The Execution Team consists of three persons internal to the Department of Corrections and has no members that are external to the agency. Members of the Execution Team are not compensated. In prior years, there was outside members that were paid; however, the new Commissioner abolished the policy and felt it was not cost-effective.

The administration of the drugs is done manually. Two IVs (one in each arm) are inserted by contracted Emergency Medical Technicians. The drugs are injected into one IV line, and the line is flushed with saline after each injection. The second IV line is used in those instances where there is a problem with the first IV line. If death does not result within ten minutes of the last injection, the drugs are readministered.

South Carolina is in process of establishing a Capital Punishment Facility (CPF) that will be separate from its

Death Row. Death Row is being moved to another institution in order to maintain anonymity for the agency staff involved and not for any issues related to the condemned persons. Condemned persons will be housed in the CPF one week prior to the scheduled date of their execution.

There have been twelve executions from 1977 to June 15, 1997. Of the twelve executions, five were by electrocution and seven by lethal injection.

Tennessee

Has electrocution as its only method of execution. The state has not had an execution since 1960. The chair was rebuilt by Fred Leuchter, an engineer from Massachusetts, in 1989. There are written procedures, some of which are made available to the public. The warden chooses the execution team from volunteers of correctional staff. The team practices and reviews procedures once a month.

The electric chair is computer controlled: there are dual controls and the computer decides which "switch" executes the inmate. There are also manual controls as a back-up. There are two electrodes attached to the leg and one in the headgear. The headgear is a leather "skull cap" with a 2-inch copper band on the inside. An elephant ear sponge, soaked in salt water is used.

Death row and the death house are located at River Bend Maximum Security Institution in Memphis. The female death row inmates (two) are housed at Tennessee Prison for Women.

A bill was introduced approximately two to three years ago to switch to lethal injection, but it did not generate a lot of interest. Officials estimate that it may be one to one and one-half years before an execution occurs.

Texas

From 1928 until 1964, the method of execution was electrocution. The electric chair was built by inmates in 1924 and now resides in a Texas Department of Criminal Justice museum. In 1977, lethal injection was adopted as the new method of execution in Texas. On December 7, 1982, Texas became the first state to use lethal injection as a means of execution.

The execution chamber has been located at the Huntsville Unit since 1924 and is still utilized. There are twelve cells immediately adjacent to the execution chamber that are used to house an inmate prior to execution.

Male Death Row inmates are located at the Ellis I Unit. Female Death Row inmates are housed at the Mountain View Unit in Gatesville, Texas.

Any inmate scheduled for execution is transported from the I/Mountain View unit to the Huntsville Unit to carry out the execution. Transportation arrangements are known only to the unit wardens involved and the exact time, method, and route of transfer are not public information. The Director's Office and the Public Information Office are notified immediately after the inmate arrives at the Huntsville Unit.

The identities of the members of the Execution Team are confidential and known only to select staff. The Execution Team consists of four persons internal to the Department of Criminal Justice and has no members that are external to the agency. Members of the Execution Team are not compensated.

The administration of the drugs is done manually. Two IVs (one in each arm) are inserted by medical staff: The drugs are injected into one IV line, and the line is flushed with saline after each injection. The second IV line is used in those instances where there is a problem with the first IV line. If death does not result from the last injection, the drugs are readministered. There are three administrations of the drugs available.

The drugs administered are: sodium thiopental, followed by pancuronium bromide, followed by potassium chloride.

The time of execution was changed in 1994 from midnight to 6:00 p.m. This was done in response to the workload in the Governor's Office associated with an execution. Changing the time of execution has resulted in a reduction of overtime for many of the staff involved.

There have been 128 executions by lethal injection from 1982 to June 15, 1997. Texas reports no problems with any executions.

Virginia

Passed legislation, effective January 1, 1995, giving the inmate the choice of electrocution or lethal injection. If the inmate does not make the choice, execution will be

by lethal injection. The sponsor of the legislation believed that lethal injection was a more modern method of execution and because there had been problems with the electric chair, he was afraid that electrocution would be declared unconstitutional. Initially $50,000 (using Louisiana's figures) was allocated for implementing lethal injection executions. However, officials have found that it cost approximately $5,000 for the equipment (gurney, tubing, and drugs).

Since allowing for lethal injection, fifteen inmates have been executed, all by lethal injection. (One inmate chose electrocution, but his execution was stayed. It is believed he chose electrocution to create more publicity.) No problems have been reported.

Execution procedure: Approximately one hour prior to the execution, the inmate is given a 10 mg. intramuscular injection of Thorazine. This procedure was once elective but is now mandatory. Corrections staff has found that by giving this shot, the inmate is more relaxed and it is easier for the technician to insert the IV. The IV line is inserted by correctional health staff. The drugs are administered from behind a partition in the execution chamber. Two correctional officers take turns manually pushing the drugs into the IV tubing. Virginia does not publicly disclose the drugs they use. A heart monitor is attached to the inmate and is read from behind the partition.

Electrocution is an option in Virginia. The last execution by electrocution was in April 1994. The chair was built by inmates in the 1960s. The electrical equipment was updated in 1990. Jay Wiechert designed the new

equipment. Virginia officials decided to keep their old "headgear." First, a leather "Halloween-style" mask is placed over the inmate's face. A brass helmet, lined with natural sponge soaked in salt water is then placed on the inmate's shaved head. The "helmet" is hinged in the middle to allow it to fit different head sizes. A leather strap is used to secure it in place. They do not used any type of electrolytic paste. One electrode is placed on the inmate's leg. Again, a leather strap secures the electrode in place. A cycle of thirty seconds of high voltage, followed by sixty seconds of low voltage is used. The heartbeat is checked five minutes after the cycle has been administered. (After the equipment was changed in 1990, the engineer who designed the equipment recommended a cycle of ten seconds of high voltage, followed by fifty seconds of low voltage. The heartbeat was checked after two minutes. The second execution that was performed this way resulted in a detectable heartbeat and another cycle was administered. Since that time, officials reverted to the original procedure.) The execution team for both lethal injection and electrocution executions are the same (with the exception of the IV technicians). Executions are generally scheduled for 9 p.m. for the convenience of the staff.

The execution room for both electrocution and lethal injection is the same. For lethal injection, a partition is drawn across the room, concealing the electric chair from the witnesses. It is from behind this partition that the drugs for the lethal injection are administered.

Executions are carried out at Greensville Correctional Center. Death row inmates are housed at Mecklenburg

Correctional Center. Virginia officials recommend housing death row inmates in a facility separate from the death house. In the 1980s, when the death row and the death house were both located in Richmond, a death row inmate had become a "hero" to the other inmates because of an earlier escape. When the inmate was executed, the other inmates rioted.

There have been a total of thirty-nine executions from 1977 to June 15, 1997; twenty-four by electrocution and fifteen by lethal injection.

Previous Legislation Proposed by Florida Legislature

The Florida Legislature has considered several bills over the last few years to change the method of execution from electrocution to lethal injection.

- HB 156 by Representative D. L. Thomas filed in the 1986 Legislative Session. Would have allowed offenders under sentence of death to choose between electrocution or lethal injection as method of execution. The analysis spoke to the cost of administering lethal injections, which ranged from the least expensive method such as Texas, which used medically trained personnel to administer the lethal injection, to New Jersey, who had purchased a computer controlled injection machine at a cost of $18,000. HB 156 died in the House Committee on Corrections, Probation and Parole.
- CS/SB 539 by Senate Committee on Corrections Probation and Parole, Senator Hair and others; and CS/HB 911 by Representative Upchurch filed in the 1988 Legislative Session. Would have provided for lethal injection as an alternative method of execution to electrocution. The decision would have been made by the

inmate one week prior to the execution. Provided that method of execution would default to electrocution if the Florida Supreme Court or the United States Supreme Court determined that lethal injection was unconstitutional. Both bills also provided that the lethal injection method would not constitute the practice of medicine, and would authorize pharmacists to provide drugs for this purpose. The analysis pointed out the controversy surrounding doctors administering the lethal injections. CS/SB 539 was passed by the Committee on Corrections, Probation and Parole and placed on the Senate Special Order Calendar. CS/HB 911 passed the House of Representatives, was read for the first time in the Senate, and referred to the Senate Committee on Corrections, Probation and Parole. On May 17, CS/HB 911 was withdrawn from the committee, substituted for CS/SB 539 (which was on the Special Order Calendar), read for the second time, and subsequently died on the Senate Calendar.

- HB 15 by Representative Garcia filed in the 1991 Legislative Session. Would have substituted lethal injection for electrocution for method of execution. HB 15 passed out of the Classification and Reorganization Subcommittee and died in the Full Committee on Corrections. The bill analysis presented the following points:

  - ◊ State would experience a probable increase in litigation arising against lethal injection as "cruel and unusual punishment" which is prohibited under the Eighth Amendment to the U.S. Constitution.

  - ◊ Whereas other federal circuit courts of appeals have upheld the use of lethal injection as a method of execution, 11th Circuit has not addressed the issue because the three states

which compose the 11th Circuit (Alabama, Georgia and Florida) all use electrocution as their method of execution.

- ◊ The retrospective nature of bill would apply the new method of execution to existing death row inmates. The analysis suggested either amending the bill to apply to prospective crimes, or allowing a choice in method of execution would circumvent litigation by existing death row inmates.

- ◊ The absence of a clause stating that administration of lethal injection would not be construed as the practice of medicine; and a clause releasing pharmacies from dispensing controlled substances without a prescription.

- ◊ The lack of a fallback position if lethal injection was declared as cruel and unusual punishment.

- ◊ The Department of Corrections reported a negligible fiscal impact associated with the switch in execution method. The department would have to either build or purchase the associated equipment. The department also reported the cost of one execution by electrocution as follows: executioner's fee $150.00; Last Meal $20.00; Suit and Shirt $150.00; Funeral Home $525.00; and security overtime $1,380.00; for a total cost of $2,225.00.

Florida's Attorney General Recommendation

Florida Attorney General Bob Butterworth has made a recommendation on this issue. In a letter to the Speaker of the House of Representatives and the President of the Senate of the Florida Legislature dated March 26, 1997,

the Attorney General recommended the passage of legislation making "lethal injection an option in carrying out capital sentences lawfully imposed by the courts of this State." The Attorney General noted that the events related to the recent execution (Pedro Medina) would most likely cause condemned murderers to "again raise electrocution as an appellate issue as they seek to avoid their lawfully imposed sentences."

Florida Corrections Commission Recommendations

Based upon Florida's recent experiences in the Medina and Tafero executions utilizing the electric chair, and after an extensive review of execution methods utilized by other states, the Florida Corrections Commission recommends that Chapter 922, Florida Statutes, be amended to allow lethal injection as an alternative method of execution, in addition to electrocution, for those persons currently on death row.

Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida. Appendix J is a proposed bill incorporating these recommendations.

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THE FLORIDA CORRECTIONS COMMISSION

The Florida Corrections Commission was established in Chapter 93-404, Laws of Florida, during a special session of the Legislature in 1993. Its specific membership,

responsibilities and powers are currently defined in s. 20.315 (6), F. S. Members of the commission are unpaid volunteers representing all geographic areas of the State, and were selected for their knowledge in the areas of construction, health care, information technology, education, business, food service, law, and inmate rehabilitation and services. The original members were appointed to the Commission on February 8, 1995, by Governor Lawton Chiles and held their first meeting at the Department of Corrections on March 17, 1995.

While the role of the Commission is advisory and policy setting, it also provides an oversight function to the department. In the Commission's mission statement, it is noted that the purpose of the correctional system should be to promote the overall state goal of protecting the public. That goal is more easily attainable and cost-effective if state and local officials and private citizens are involved in the development and oversight of correctional programs and operations.

Included among the primary functions of the Corrections Commission are: to recommend major correctional policies and assure that approved policies and revisions are properly executed; review community-based intermediate sanctions and recommend intergovernmental approaches; evaluate the annual Department of Corrections' legislative budget request, the comprehensive correctional master plan and the tentative construction program; monitor the financial status of the department; and, regularly evaluate the efficiency, productivity, and management of the department.

Another principal assignment of the Corrections Commission is public education. The citizens of this state should be informed about the workings of the criminal justice system and strategies that reduce crime and promote public safety. It is the intention of the Corrections Commission to conduct a rigorous public education campaign on corrections and criminal justice issues.

THE FLORIDA CORRECTIONS COMMISSION MEMBERS

Edgar M. Dunn, Jr., who was elected Chair of the Commission, is an attorney. He is a member of the Board of Governors of The Florida Bar. In the past he has served the State of Florida as a State Senator for twelve years, as a member of the Florida Commission on Elections, as General Counsel to Governor Reubin O'D Askew, and as an Assistant State Attorney.

Katie C. Nichols, who was elected Vice Chair of the Commission, is self-employed and a philanthropist. She was appointed to the Florida Public Service Commission for two four-year terms, chairing that commission from 1987-88. Ms. Nichols has also been a member of the Florida Energy Council and the Governor's Commission on Grand Jury Reform. She currently serves as Chairman of the Board of Directors of the National Council on Crime and Delinquency.

Steven M. Florio is an adjunct professor at Florida International University in the School of Hospitality Management and past president of the Florida Chapter of the American Correctional Food Service Association. Mr. Florio served eight years as the food service coordinator for the Broward County Sheriffs Office.

The Honorable David F. Harvey is the sheriff of Wakulla County, having served since 1976. He is a past president of the Florida Sheriffs Association and Apalachee Human Services and was the Vice Chair of the Florida Council on Criminal Justice. Sheriff Harvey presently chairs the Wakulla County Juvenile Justice Council.

Alma B. Littles, M.D., is a physician specializing in Family Practice. Included among her many service activities are Secretary-Treasurer of the Florida Academy of Family Physicians, President of Capital Medical Society, Board of Directors of Big Bend Hospice, and Community Preceptor for the University of Florida College of Medicine. She has been in private practice for over seven years, and joined the faculty at the Tallahassee Memorial Regional Medical Center Family Practice Residency Program in November 1996.

Guy Revell, Jr., served as a Commissioner with the Florida Parole Commission for thirteen years. He has also held positions with the Governor's Office, the Department of Health and Rehabilitative Services, The Florida and National Councils on Crime and Delinquency and the American Correctional Association.

The Honorable Ray Sansom has been an Okaloosa County Commissioner since 1992. He is very active in

county government organizations, serving as the Chairman of the Florida Association of Counties' Public Safety Committee and as a member of the National Association of Counties' Public Safety, Corrections and Criminal Justice Committee.

Aaron Wallace is the President of Florida Teaching Profession-National Education Association. He is also a member of the Florida Education Practices Commission, having chaired the commission from 1993-94. Mr. Wallace retired after twenty years experience as a law enforcement specialist with the U.S. Air Force.

ACKNOWLEDGMENTS

The Corrections Commission wishes to thank the following people and organizations for their assistance and cooperation in the compilation of this report:

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Alabama
Arkansas
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Appendices

Appendix A

Report on findings and Recommendations Prepared following visit to Florida State Penitentiary at Starke, FL on April 8, 1997

Prepared by: Michael S. Morse
Date: April 10, 1997

Preface:

In 1990 I visited the Florida State Penitentiary at Starke, tested the electric chair and made recommendations. At that time, the equipment functioned as is expected and necessary to deliver a lethal shock without inflicting pain. At that visit recommendations were made and discussions were held regarding procedures and protocols.

Present Visit:

Present at this visitation was Mr. Jay Wiechert, Owner JAY WIECHERT MFG., Mr. Thomas Crapps, Assistant General Counsel, Governor's Legal Office, Mr. Ken Nunnelly, Office of the Attorney General, Mr. Ron McAndrew, Superintendent, Florida State Prison, Mr. Carl Hackle, Maintenance and Construction Superintendent, Florida State Prison, Mr. Jackie McNeill, Chief of Utilities, Florida State Prison. Also present were other DOC employees. Mr. Jim Luther of South Carolina DOC (retired) arrived later in the day.

NOTE: On the issues of Power Engineering, and power system design, I offer no comment and defer to Mr. Jay Wiechert, an expert in such areas.

Pre-Briefing:

Prior to conducting any tests, a meeting was held to discuss procedures and protocols followed by the DOC

during executions with particular emphasis placed on the procedures followed during the Medina execution. The chart recordings of voltage and current taken during the Medina execution were reviewed and discussed.

The following was noted:

1. An anomaly was noted in the trace of electrical current from the chartrecording made during the Medina execution. The current charted at the start of the execution was 4.5 amps).

2. It was noted that the procedure for preparing sponges for the headpiece included the use of dry sponge under which a wet sponge (soaked in .9% sodium chloride) was placed prior to placing the headpiece on the inmate. (Both experts present agreed that the use of a dry sponge was a practice which needed to be discontinued and also that the saline solution used should be replaced by a saturated saline solution.)

3. A discussion regarding corrosion of the screen in the headpiece yielded the conclusion that such corrosion was unlikely to have had an effect on the Medina execution. (This was verified by testing conducted with an equally corroded screen.)

Tests Conducted:

Mr. Wiechert and I conducted several tests on the electrocution equipment. Initially, tests were run to measure voltage and current produced by the system. A bucket filled with water into which electrodes were placed was used to provide an appropriate resistive load. The result of these initial tests were recorded by Mr. Wiechert.

The resistive load was calculated to be between 200 and 250 ohms which is in the range of typical values for a human as observed during an execution.

The system was then tested with the headpiece placed in series with the resistive load as would be typical during an electrocution.

In the first test, the individuals responsible for preparing the sponges and headpiece during the Medina execution were asked to follow the same procedures that they had followed and to affix the headpiece and combination of dry and soaked sponge to the top of a metal semisphere placed in series with the load. Less than one minute was allowed to elapse. The headpiece used was a backup headpiece with similar corrosion to that found on the headpiece used during the Medina execution. The system was energized and the result was that the dry sponge smoked and burnt as was observed during the first high voltage cycle of the Medina execution. This confirmed that the problem was the result of the use of a dry sponge in conjunction with a wet sponge. The situation is possibly exacerbated by the use of .9% saline. Localized blackening was observed on the metal semisphere indicating a current transfer area less than the area of the soaked sponge. This indicated a higher localized current density and burning of the sponge. The increased current density occurred as the result of limiting the area of electrical current transfer through the use of a dry sponge.

The test was repeated with the same headpiece but with only a single sponge which had been soaked in saturated saline solution. No burning or smoking was observed. It

is noted that in both tests the headpiece had the same level of corrosion.

Chart recordings were made at different points during the testing. At one point, the voltage trace of the chart recorder failed to operate properly.

Conclusions:

1. The execution machinery continues to perform at an appropriate current and voltage level to perform executions without causing pain or undue suffering.

2. The problems which arose during the Medina execution were the result of using a dry sponge between the wet sponge and the conductive screen in the headpiece. This dry sponge limited the area of conduction, increasing the current density, creating localized resistive heating at the top of the wet sponge and ultimately causing the sponge to ignite.

3. The situation described in (2) is probably exacerbated by the use of .9% saline.

4. On the assumption that electrocution at the level of several amperes causes instant depolarization of brain tissue, it is unlikely that Mr. Medina felt pain during his execution. The increased current density caused a higher level of localized tissue damage limited to the area of increased current density.

Recommendations:

1. It is noted that there was a significant change of personnel between my visit in 1990 and in 1997. It is not known at what point or by what process a decision was made to use a dry sponge or at what point or by what

process a decision was made to use .9% saline. Such procedural changes *must* be avoided in the future. *In the future it is recommended that a single sponge soaked in saturated saline be used in the headpiece.*

2. The problems observed in (1) could be avoided if detailed written procedures for each of the following are prepared and maintained on file:

- Tasks to be performed by each member of the execution team before, during, and after an execution.
- Procedure for choosing sponges, preparing sponges and for preparing saline solution.
- Procedures for preparing and testing each piece of execution equipment prior to an execution.
- Procedures and test schedule to be followed preceding an execution

2. It is recommended that all equipment be thoroughly inspected prior to each execution and any equipment showing indications of wear be serviced (or replaced) and then tested prior to use. *Under no circumstances should equipment be replaced with dissimilar or untested equipment. Such changes in procedure or equipment can lead to unanticipated results.*

3. It is recommended that the Chart recorder be serviced and calibrated on-site in preparation for each execution. Pens with adequate ink should be used. chart recordings should be made and dated at each test of the electrical system prior to an execution. Each chart recording should be marked indicating direction of trace chart speed (in inches per second), and vertical scale (amps or volts).

4. Headpiece, sponge, and legpiece should be tested in conjunction with the electrical equipment at least once prior to each execution. (The electrical machinery should be tested several times prior to each execution Testing schedule and procedure should be established by an expert such as Mr. Wiechert.)

5. Following an execution, it is recommended that the sponge used be placed in a sealed plastic bag and that it not be reused.

6. Following an execution, it is recommended that pictures be taken documenting the condition of the inmate while still in the chair. Photographs should include pictures of all components in contact with the inmate as well as points of contact on the inmate.

7. A witness should be present during each execution who is responsible for noting time and nature of any happening out of the ordinary.

8. The state should use a more standardized test load than is currently used to ensure consistency in testing of the system. Although the use of a bucket of water (with salt) is highly effective, there is enough variability to justify the expense of creating a test load. (See Mr. Wiechert for details.)

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EXAMINATION OF EXECUTION EQUIPMENT

April 8, 1997 Starke, FL

Meeting was arranged by Mr. Thomas Crapps (Governor's Legal Office) to determine cause of headgear fire during Medina execution and also to make improvements to equipment and procedures for future executions.

Dr. Michael Morse of San Diego was employed as consultant. He has electrical and medical background as well as experience with electric chairs in various states. I was employed because I design and build new electrocution equipment and have serviced older equipment.

Mr. Ron McAndrew (Superintendent Florida State. Prison) and his staff described in detail the Medina execution and the preparations preceding the execution. Body electrodes and sponges were examined. Chart paper showing voltage and current during Medina execution was examined.

After preliminary conference, we examined the execution equipment in the Death House. Generator was used to provide power for equipment (consistent with actual execution). Water bucket with two brass rods (resistive load) was used to simulate a human body (approximately 250

ohms). Headgear and sponges were tested using metal bowl (simulate scalp). Electrical instrument readings (voltage and current) were compared. Portable meters were provided by Dr. Morse and myself. Panel mounted voltmeter and ammeter was observed as well as chart recordings.

CONCLUSIONS CONCERNING MEDINA EXECUTION

Burning of headgear was caused by improper preparation of sponges. The small sponge attached to brass screen was dry. The separate larger sponge was soaked in .9% sodium chloride. During the execution, enough saline solution transferred from wet sponge to dry sponge to permit lethal current to flow. Due to small wetted area, the current density was great, thus elevating the temperature. Burning of sponge and headgear resulted.

Oxidation (discoloring) of brass screen, although undesirable, probably was not a factor.

Execution equipment, up to and including high voltage cables, performed properly.

RECOMMENDATIONS

1. Use single natural sea sponge larger than brass screen (brass must not touch skin). Soak in saturated salt water (not .9%). Saline solution is saturated if undissolved salt remains in bottom of container after stirring. Sponges must be wet. Very slight dripping of saline may result from tightening electrode straps (use towel). Repair leg electrodes (replace lead with brass).

2. Use of gel on skin is optional. Most executions have been performed without gel. If used successfully in past, don't change brands.

3. Fix and calibrate chart recorder. Erratic operation was observed during testing. Time scale (inches per second) must be measured and recorded on chart paper. Voltmeter and ammeter are working properly.

4. Written test procedure and execution procedure should be implemented. Duty assignments should be given to each team member (if someone is absent, his duties are spelled out for an alternate).

5. Electrical schmatic of equipment must be in hand during test and during execution. Electrician must be in attendance and be familiar with equipment. Purchase spare parts crucial to execution.

6. Test equipment quarterly. Test equipment one month prior to scheduled execution (allow time to order replacement parts if required). Use a repeatable resistive load for testing (measured voltage and current should remain the same year after year). I have loaned Superintendent Ron McAndrew a Test Unit for this purpose. Energize chart recorder during test, record date on chart paper and save.

7. At the conclusion of an execution, notes should be recorded from team members (debriefing). This will be valuable to team performing the next execution.

Note: Both reports recreated from copies of original documents.

Lethal injection
a better choice

Sanford Herald 4/10/97

If it ain't broke, don't fix it. The problem is, Old Sparky apparently is broken, but rather than fix it, perhaps the state should consider putting it into retirement.

Known as Old Sparky, Florida's electric chair appears to have a malfunction. It was noted for the second time during the March 25 execution of convicted killer Pedro Medina. When the switch was thrown, a short caused flames to shoot several inches out of the mask being worn by Medina.

Naturally, the prison medical specialist immediately announced that it did not cause any undue pain for Medina, who was supposed to be already dead by the time the flames were noticed.

This is the second time this has happened. The first time was in May of 1990, during the execution of another convicted murderer, Jesse Tafero.

Many decades ago, the common death penalty was hanging. Then, one by one, states eliminated that method in favor of the electric chair. It was more humane, they determined.

Recently, states have taken another step, and changed the execution process to the use of a lethal injection. Again, they say it is more humane.

Yes, without question, there are many people who would prefer the complete elimination of all types of death sentences. Their point of view, and well taken, is that no one should have the right to take another's life.

Unfortunately, there are some, such as Medina and Tafero, who apparently don't support this. They kill. Then, try to convince friends and family members of the persons who were murdered that the death penalty is wrong. Most of them demand an eye for an eye, and fully approve of the death sentence.

But whether or not to continue that form of punishment is a question which is not going to be answered easily or in the near future.

What must be determined however, is that the state should not become involved in repairing or replacing Old Sparky. Toss it out, put in a museum, or blow it to kingdom-come. But let's eliminate it, and if the death penalty must continue, use the lethal injection method as do the majority of other states.

EDITORIALS

[Plaintiff 4-2-97]

There's no reason to delay executions

Four medical examiners have concluded that Pedro Medina felt no extraordinary pain when he was executed in Florida's electric chair last week. Two of those experts conducted their examinations on behalf of Medina's lawyers.

Medina's death became an issue because during the course of the electrocution a foot-long blue-and-orange flame shot up for six to 10 seconds from the mask he was

wearing, sending smoke into the execution chamber and the visitor seating area.

A LAWYER FOR the state office that represents death row inmates has asked Gov. Lawton Chiles to halt two executions scheduled for April and to stop signing death warrants.

There is no reason to do this. The pathologists agree that Medina did not suffer any more than other executed inmates. Apparently what caused the flame was a corroded copper screen in the headpiece.

Carrying out an execution or being an official witness at one is, by definition, a grisly duty. Dying in the electric chair may be near-instantaneous, with consciousness wiped out in a flash, but it is still a horrible way to end a life.

Well, it is designed to be repellent. That's no accident. It need not be tidied up for the benefit of those in the visitors' seats.

There is no reason to abandon the electric chair in favor of lethal injection simply because of what happened to Pedro Medina. Executing a murderer is not like having a veterinarian put an aging, sick pet out of its misery. It is not even like the suicides that Jack Kevorkian has assisted. It is society's outraged response to dreadful, heinous acts.

There are two executions planned for this month. Consider the cases:

■ April 15, Leo Alexander Jones is set to be executed. He was a part-time pool hall worker in Jacksonville who became angry in 1981 about being charged with resisting

arrest for a traffic infraction, and he vowed to "kill a pig." A week later, Jones was lying in wait when Officer Thomas J. Szafranski came down the street in his squad car, responding to a domestic disturbance. Jones shot him dead with a 30-30 Winchester rifle. Police found the gun under Jones' bed.

■ April 29, Gerald Eugene Stano is scheduled to die in the electric chair. Stano has confessed to 41 killings. He was sentenced to death in 1983 for the murders of three Volusia County women. He has also been sentenced to life in prison for six killings, dating back to the 1970s. Described as utterly without a conscience and completely remorseless. Stano has admitted killing females who ranged in age from 12 to the mid-50s.

ONE LAWYER representing Stano argued in 1986 that he should be spared in order to be studied. "We need to know more about why serial killers like Mr. Stano do what they do," Sam Bardwell told the governor and clemency board.

Back in 1983, the parents of one murder victim spoke eloquently about justice for Gerald Stano: "Life in prison is not sufficient punishment. Gerald Stano should be sentenced to death. He could then experience the fear and helplessness that all his victims felt when he chose to end their lives."

EDITORIAL
Justice, not torture

Ocala Star Banner 3/27/97

For almost three-quarters of a century, the method of execution in Florida has been the electric chair, but after two mishaps – one in 1990, the other on Tuesday – it is imperative that the state enter the next millennium with a more modern, humane method.

"Old Sparky," the nickname for Florida's electric chair, has malfunctioned twice in seven years. Instead of routinely electrocuting its occupant, the 74-year-old chair has also set fire to two men being put to death.

The results have been the same – death. But the means are once again in question. When foot long flames shoot from an inmate's head during an execution, questions rightly surface as to whether the death was torturous. Officials aren't sure whether 39-year-old murderer Pedro Medina suffered additional pain.

No doubt it was a gruesome sight for witnesses. There will almost certainly be calls to change the system. We urge legislators to act responsibly.

It's time for Florida to implement a more humane method of execution.

No one can be certain how much pain is felt by those who experience the death penalty. After all, none of those who have paid the ultimate price for their crimes have been able to tell of it.

There are theories that the most painless execution is by way of the guillotine. But the thought of heads literally rolling in Florida is out of the question. Over history, civilized societies have steadily moved toward less barbaric ways of ridding the population of those deemed undeserving of further life. People today shudder at the thought that crucifixion was once an accepted execution method. Beheading people via axe or guillotine, are likewise viewed as barbaric. Firing squads are pretty much outmoded, as are hangings.

A number of states have switched to lethal injection execution. But Tuesday's reaction by legislators to the fire at Florida State Prison in Starke suggests that most are satisfied with status quo. Death by electrocution, we believe, will someday be deemed just as barbaric as earlier methods.

On Tuesday, Attorney General Bob Butterworth warned, "People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair."

We deplore Butterworth's insensitivity. Also, the attorney general does not seem to understand that the death penalty does not deter murder. The death penalty is primarily a form of retribution and rendering justice. Those who have witnessed executions are some of the most vehement opponents of the death penalty. But we submit that were those same people to witness the torture and murder of helpless victims, the death penalty might not seem severe enough.

Though some people believe [Illegible] living on death row for years, generally exceed that of sentencing a murderer to life without chance of parole.

According to the Department of Corrections, the average length of stay on death row prior to execution is 10.2 years.

But there are some inmates who stay much longer. A local example is Ian Lightbourne who was convicted of raping and murdering Nancy O'Farrel in Ocala in January 1981. Lightbourne was tried and found guilty on April 25, 1981. His trial and conviction were swift, but his execution has been stayed several times. He continues to live on death row 16 years later.

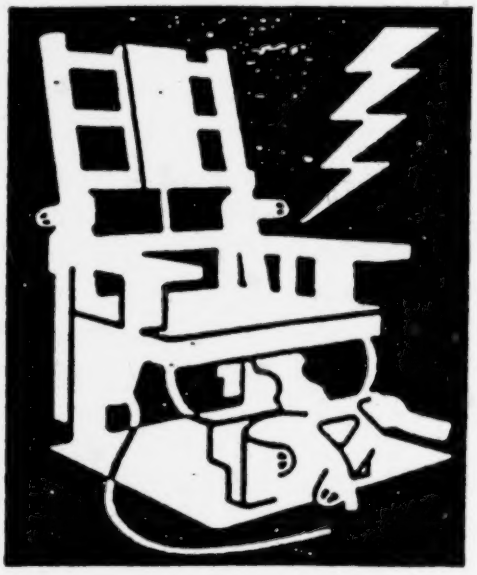
Those who have been sentenced to death (381 inmates are now on death row) have been convicted of committing premeditated murders. But Florida needn't stoop to the level of brutality carried out by murderers. This newspaper supports the death penalty, but it is time to implement a more humane method of execution.

Old Sparky is legal

Regardless whether condemned killer Leo Jones was given a fair hearing, there is no rational basis for his argument that Florida's method of execution is unconstitutional.

It is true, as Jones notes, that the electric chair's headpiece caught fire March 25, causing flames to shoot

from under the mask of Pedro Medina. But the problem has been fixed – and even if it had not, that in itself would not violate the Eighth Amendment ban on "cruel and unusual punishments."



Jones' lawyer, based on the accounts of non-medical witnesses, says Medina was still breathing after the voltage was sent through his body and therefore he probably suffered. But the attending physician testified he died instantly.

After a weeklong hearing, Circuit Judge A.C. Soud of Jacksonville ruled the Jones execution could go forward.

Jones' lawyer, however, complained to the Florida Supreme Court that he had been given voltage charts too late to be of any use and that Soud improperly had refused to grant a delay so his expert witnesses could appear.

Prosecutors insist the attorney should have requested the material sooner – and Soud acted reasonably in relying on the testimony of a medical expert who was there, rather than theories based on the impressions of lay people.

It will take legal experts to determine whether the hearing was fair. We certainly are not capable of doing that.

But it does not seem unreasonable to rely on the opinion of the attending physician when drawing a medical conclusion. Even if the condemned man does experience some pain in his execution, pain is a natural part of dying. It is the body's way of telling a person that something is wrong.

More than 100 years of Supreme Court precedent is on the state's side.

In the 1879 Wilkerson case, the high court said only torture and other "atrocities" – such as burning at the stake, crucifixion or breaking on the wheel – would be cruel and unusual.

In the 1890 Kemmler case, it clearly said electrocution was constitutional.

It is also said hanging was permissible in that decision. When done properly, hanging is a quick and painless way to die. But when botched, death can be considerably slower and far more painful than an electrocution.

The court further clarified the Eighth Amendment in the 1910 Weems case, saying it was unduly cruel to chain

somebody in prison from 12 to 20 years for merely entering a false statement in the public record. It further explained, 67 years later in the Coker and Eberheart cases, that a sentence had to be "grossly disproportionate to the offense" to be unconstitutional.

Jones was convicted of gunning down a local police officer in a 1981 ambush. The death penalty does not seem excessive for intentionally taking another person's life, even if there is some evidence that the perpetrator – like his victim – might conceivably feel some pain during his final moments.

BRADENTON HERALD
BRADENTON
DAILY – 54,000
APRIL 5, 1997

Our viewpoint

Wasting organs

We have an addendum to Friday's editorial advocating replacing Florida's electric chair with lethal injection to carry out the death penalty.

A letter from attorney Ellis Rubin reminded us of a point we missed in our argument. As Rubin wrote:

"If there are to be executions, let the suggested method and results be ratified as the new, civilized approach to the death penalty. Death by lethal injection is

the only way that vital organs can be preserved and made ready for transplantation."

In his letter Rubin cited the case of Daniel Faries, sentenced to death by the Dade Circuit Court. At the request of Faries, in 1992, Rubin asked the court to execute Faries by lethal injection so that when he gave up his life his organs could be passed on to others to compensate for the death he caused.

Had the court agreed, up to five persons could have been recipients of Faries' heart, kidneys, liver, lungs, pancreas, corneas and other transplantable organs.

The court refused to grant Faries' request. He was killed by the state, and so were the opportunities for new lives that he could have been passed on to very sick people who have no other hope than an organ transplant.

What a waste. Not only were Faries' organs needlessly destroyed, his compassionate wish to compensate for his terrible crime was denied by the state.

Yes, organ harvesting could create opportunities for massive abuse of prisoners' rights. No way should the state be given an opportunity to turn death row into a reservoir of organs for harvest.

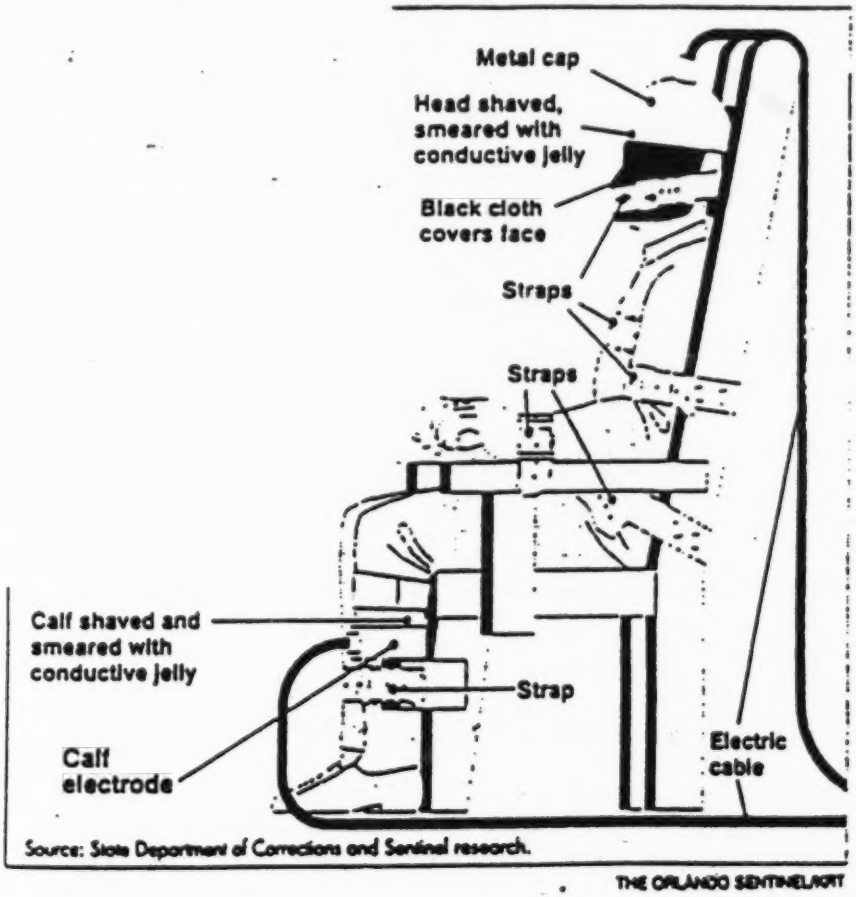
But there are ways to safeguard against abuse. The key is to keep the decisions to become a donor voluntary, without any coercion. The wish to become a donor must be seen as an opportunity for restitution the convict is free to accept or reject.

If we must put people to death for their crimes, let us know [sic] take away the last opportunity they have to do good for society.

Giving them this option could mean their salvation.

Appendix C

Diagram of Florida's Electric Chair



Appendix D

Courts and Cases Upholding Lethal Injection

Military Court Marshals	*Hunt v. Nuth,* 57 F.3d 1327 (4th Cir. 1995)
All Federal Prisoners	*U.S. v. Chandler,* 950 F. Supp. 1545 (N.D. Ala. 1996)
	Fed. Def. convicted as drug king-pin & sentenced to die. Ct. Found Dept. of Justice Regs. no 8th A violation.
	The only court that has examined a similar challenge to execution by lethal injection has rejected it. See:
5th Cir.	Wools v. McCotter, 798 F.2d 695, 697-98 (5th Cir. 1986) (federal prisoners)
(Texas)	*Kelly v. Lynaugh,* 862 F.2d 1126 (5th Cir. 1988) (state prisoners)
3d Cir. (Penn.)	*Zettlemoyer v. Horn,* 53 F.3d 24 (3rd Cir. 1995)
4th Cir. (Maryland)	*Hunt v. Nuth,* 57 F.3d 1327 (4th cir. 1995)
10th Cir. (Utah)	*Andrews v. Shulsen,* 802 F2d 1256 (10th Cir. 1986)
9th Cir. (Washington)	*Rupe v. Wood,* 93 F.3d 1434 (9th Cir. 1995)

James Blodgett gained hundred of pounds to weigh 400+. Statute gave him choice between hanging and lethal injection. He chose hanging and then challenged its constitutionality. The 9th court had stayed his execution until he lost weight but also wouldn't let authorities limit his canteen food (how he gained the weight). But on 6/6/96, the Wash. leg. changed statute to say there was "a presumption in favor of lethal injection" so that if hanging were declared 8th A violation in one case then that Defendant would have to have lethal injection. Said lethal injection CON.

9th Cir. (Arizona)	*State v. Hinchey,* 890 P.2d 602, 610, cert. denied, ___ U.S. ___, 116 s.ct. 528, 133 L.Ed.2d 434 (1995)
California	*Fierro v. Gomez,* 865 F.Supp. 1387 (ND Cal. 1994) Numerous cases in dicta in comparison to lethal gas.
Connecticut	*State v. Webb,* 680 A.2d 147 (Ct. 1996)
Delaware	*Dawson v. State,* 673 A.2d 1186 (Del. 1996)
Idaho	*Sivak v. State,* 731 P.2d 192 (Idaho 1987)
Illinois	*Holman v. Gilmore,* 1997 WL 89126 (N.D. Ill. 1997)
Indiana	*Harrison v. State,* 644 NE2d 1243 (Ind. 1995)

By dicta said lethal injection okay. Prisoner attempted to argue electrocution

	8th A violation, cited Brennan's dissent in *Glass v. Louisiana*, 471 U.S. 1080, 105 S.Ct. 2159, 85 L.Ed.2d 514 (1985) "in an age which offers the alternative of lethal injection, the barbaric killing of people in 1993 by putting them in an antiquated electrical device should be considered no less cruel and unusual than burning at the stake . . . was considered to be in 1890."
Louisiana	*Thompson v. Gain*, 1997 WL 79295 (E.D.La.)
Mississippi	*Booker v. Murphy*, 1997 WL 6095 (S.D. Miss. 1997) *Carr v. State*, 655 So.2d 824 (Miss. 1995) Three prisoners sentenced to die by lethal gas before legislature changed method to lethal injection. They challenged right to lethal injection. Ct. remanded (Also, prisoners were trying to sue for damages of being left on death row with threat of gas but court threw out claim under qualified immunity.)
Montana	*State v. Gollehon*, 864 P.2d 249 (Mont. 1993)
Oklahoma	*Romano v. State*, 917 P.2d 12 (Ok. 1996)
South Dakota	*State v. Moeller*, 548 N.W.2d 465 (S.D. 1996)
Texas	*Ex parte Granviel*, 561 S.W.2d 503, 514 (Tex. 1978)
Tennessee	*State v. Barber*, 753 S.W. 2d 659, 670 (Tenn. 1988)

	In dicta, said yes. Justice Fones for court said "the validity and humanity of that complaint {that electrocution is cruel} should be addressed to the legislature. This Court's authority over punishment for crime ends with adjudication of constitutionality."
Virginia	*Mickens v. Virginia,* 478 S.E.2d 302 (Va. 1996)
	Although said that 8th A issue was procedurally barred, did say that there was no merit to claim because all cases have upheld its CON.
Wyoming	*Hopkinson v. State,* 798 P.2d 1186 (Wy. 1990)
	Other Relevant Cases
Supreme Court	*Skillern v. Procunier,* denied cert., 469 U.S. 1182, 105 S.Ct. 945, 83 L.Ed.2d 956 (1985); 8th A only claim and court refused to review.
Supreme Court	*Gray v. Lucus,* 463 U.S. 1237, 104 S.Ct. 211 (1983)
	Declared gas unconstitutional and gave criteria for 8th A punishment violation which is standard all prisoners must meet.
11th Circuit	See *Spenkelink,* 578 F.2d at 616 (11th Cir.)
	He was trying to claim that chair was 8th A uncon, and said that since other states turning to lethal injection, it was particularly cruel and unusual. In dicta the 11th Cir. made the presumption that lethal injection was CON when stating

that even though it was used in other states, no 8th A violation for chair.

Relied on Kimmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890) (a hanging case with same issue about less cruel alternatives in other states)

Source: Office of the Governor

Methods of Execution by State

Lethal Injection		Electrocution	Lethal Gas	Hanging	Firing Squad
Arizona †▲	New Hampshire †	Alabama	Arizona ▲	Delaware ▲	Idaho[1]
Arkansas †▲	New Jersey	Arkansas ▲	Maryland[2]	New Hampshire ▲▲▲	Oklahoma †††
California	New Mexico	Florida	Mississippi ▲▲	Washington[3]	Utah[3]
Colorado	New York	Georgia	Missouri[1]		
Connecticut	North Carolina[3]	Kentucky	North Carolina[3] †		
Delaware †▲	Ohio[3]	Nebraska	Wyoming ††		
Idaho[1]†	Oklahoma †	Ohio[3] †			
Illinois	Oregon	Oklahoma ††			
Indiana	Pennsylvania	South Carolina[3] †			
Kansas	South Carolina[3] †	Tennessee			
Louisiana	South Dakota	Virginia[3]			
Maryland †	Texas				
Mississippi †	Utah[3]				
Missouri[1]†	Virginia[3] †				
Montana	Washington[3] †				
Nevada	Wyoming †				

States with No Capital Punishment

Alaska
Hawaii
Iowa
Maine
Massachusetts
Michigan
Minnesota
North Dakota
Rhode Island
Vermont
West Virginia
Washington, D.C.
Wisconsin

† Primary method of execution

†† Authorized if the primary method is held unconstitutional

††† Authorized if the secondary method is held unconstitutional

▲ Authorized for those inmates sentenced before the date established for the primary method to select between the two methods

▲▲ Authorized for those inmates sentenced before the date established for the primary method

▲▲▲ Authorized only if primary method can not be used

1 DC director chooses method of execution

2 Authorizes lethal gas for only one (1) inmate

3 Inmate chooses method of execution

☐ Authorizes two or more methods of execution

Prepared by Staff of the Florida House of Representatives Based on a telephone survey conducted April 1997, and *Capital Punishment 1995*, U.S. Department of Justice

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Appendix F

Prisoners Under Sentence of Death

State	Bureau of Justice Statistics As of 12/31/95		NAACP Legal Defense Fund As of 7/31/96	
	Number	%	Number	%
Federal	8	0.26%	10	0.32%
US Military	N/A	N/A	9	0.29%
California	420	13.75%	444	14.07%
Texas	404	13.23%	394	12.48%
Florida	362	11.85%	349	11.06%
Pennsylvania	196	6.42%	201	6.37%
Ohio	155	5.08%	150	4.75%
Illinois	154	5.04%	172	5.45%
Alabama	143	4.68%	151	4.78%
North Carolina	139	4.55%	154	4.88%
Oklahoma	129	4.22%	124	3.93%
Arizona	117	3.83%	122	3.87%
Georgia	98	3.21%	108	3.42%
Tennessee	96	3.14%	102	3.23%
Missouri	92	3.01%	94	2.98%
Nevada	75	2.46%	81	2.57%
South Carolina	67	2.19%	71	2.25%
Louisiana	57	1.87%	58	1.84%
Virginia	56	1.83%	53	1.68%
Mississippi	49	1.60%	53	1.68%
Indiana	46	1.51%	49	1.55%
Arkansas	38	1.24%	42	1.33%
Kentucky	28	0.92%	28	0.89%
Oregon	20	0.65%	22	0.70%
Idaho	19	0.62%	19	0.60%
Delaware	14	0.46%	11	0.35%
Maryland	13	0.43%	17	0.54%
Nebraska	10	0.33%	9	0.29%
New Jersey	10	0.33%	16	0.51%
Utah	10	0.33%	10	0.32%
Washington	9	0.29%	13	0.41%
Montana	6	0.20%	6	0.19%
Connecticut	5	0.16%	5	0.16%
Colorado	4	0.13%	4	0.13%
New Mexico	3	0.10%	3	0.10%
South Dakota	2	0.07%	2	0.06%
Kansas	0	0.00%	0	0.00%
New Hampshire	0	0.00%	0	0.00%
Wyoming	0	0.00%	0	0.00%
Total	**3,054**	**100.00%**	**3,156**	**100.00%**

Appendix G

Executions in the U.S.: 1977-Present

State	Method																				Total
	Lethal Injection				Electrocution				Gas Chamber				Firing Squad				Hanging				
	77-90	91-95	1996	1997	77-90	91-95	1996	1997	77-90	91-95	1996	1997	77-90	91-95	1996	1997	77-90	91-95	1996	1997	
AL					8	4	1	3													16
AR		9	1	3	2																15
AZ		3	2	1						1											7
CA		1	2							1											4
DE		5	2																1		8
FL					25	11	2	1													39
GA					14	6	2														22
ID		1																			1
IL	1	6	1																		8
IN			1		2	1															4
LA		2	1	1	19	1															24
MD		1																			1
MO	5	12	6	1																	24
MS									4												4
MT		1																			1
NC	1	4							2	1											8
NE						1	1														2
NV	4		1		1																6
OK	1	5	2	1																	9
OR			1	1																	2
PA		2																			2
SC		1	5	1	3	1	1														12
TX	37	67	3	21																	128
UT	2	1											1		1						5
VA		5	8	2	11	13															39
WA																		2			2
WY		1																			1
Subtotal	51	127	36	32	85	38	7	4	6	3	0	0	1	0	1	0	0	2	1	0	394
Subtotal	246				134				9				2				3				394

Percentage by Method
1977-1997

Lethal Injection	62.44%
Electrocution	34.01%
Gas Chamber	2.28%
Firing Squad	0.51%
Hanging	0.76%
Total	100.00%

Percentage by Method
1977-1990

Lethal Injection	35.66%
Electrocution	59.44%
Gas Chamber	4.20%
Firing Squad	0.70%
Hanging	0.00%
Total	100.00%

Percentage by Method
1991-1997

Lethal Injection	77.69%
Electrocution	19.52%
Gas Chamber	1.20%
Firing Squad	0.40%
Hanging	1.20%
Total	100.00%

Source: Compiled from "Executions in the U.S. 1976-1997," Death Penalty Information Center as of 6/15/97

Appendix H

Death Penalty Information Sources On the Internet

National Sources

Capital Punishment 1995, U.S. Department of Justice (link to Adobe Acrobat file): http://www.ncjrs.org/corrdocs.htm

Court TV Library: The Death Penalty: http://www.courttv.com/library/capita/

Death Penalty Information & Resources; Anti-Capitol Punishment Resources from the ASC's (American Society of Criminology) Critical Criminology Division: http://sun.soci.niu.edu/~critcrim/dp/dp.html

Death Penalty Information Center, Washington, D.C.: http://www.essential.org/dpic/

Death Penalty News and Updates: http://www.smu.edu/~deathpen/

Friends for Life: http//www.friends-for-life.demon.co.uk/

The Pro-Death Penalty Page: http://www.geocities.com/CapitolHill/8169/

Florida Sources

Attorney General's letter to House and Senate leaders supporting lethal injection as a method of execution, March 26, 1997: http://legal.firn.edu/justice/lethal.htm

Death Penalty Page sponsored by the Florida State University College of Law: http://law.fsu.edu/lawtech/deathpen/deathpen.html

Florida Death Row Roster:

http://www.dos.state.fl.us/corrections/security/drroster.html

Florida Department of Corrections Death Row Fact Sheet: http://www.dos.state.fl.us/corrections/security/deathrow.html

Florida Execution List: http://www.dos.state.fl.us/corrections/security/execlist.html

Florida's Women on Death Row: http://www.dos.state.fl.us/corrections/security/womendr.html

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Appendix I

Post-Furman Botched Executions

by Michael L. Radelet
updated by the Death Penalty Information Center

1. April 22, 1983. Alabama. John Evans. After the first jolt of electricity, sparks and flames erupted from the electrode attached to his leg. The electrode then burst from the strap holding it in place and caught on fire. Smoke and sparks came out from under the hood. Two physicians entered the chamber and found a heartbeat. The electrode was reattached to his leg. More smoke and burning flesh. Again doctors found a heartbeat. Ignoring

the pleas of Evan's lawyer, Russ Canan (202-292-7676), a third jolt was applied. The execution took 14 minutes and left Evan's body charred and smoldering. Canan describes the experience in M.L. Radelet (Ed.), Facing the Death Penalty: Essays on a Cruel and Unusual Punishment (1989). (See also Glass v. Louisiana, 471 U.S. 1080 (1985)).

2. Sept. 2, 1983. Mississippi. Jimmy Lee Gray. Officials had to clear the room eight minutes after the gas was released when Gray's desperate gasps for air repulsed witnesses. His attorney, Dennis Balske of Montgomery, Alabama, criticized state officials for clearing the room when the inmate was still alive. Says David Bruck, "Jimmy Lee Gray died banging his head against a steel pole in the gas chamber while reporters counted his moans (eleven, according to the Associated Press)" (Bruck, New Republic, Dec. 12, 1983 at 24-25).

3. December 12, 1984. Georgia. Alpha Otis Stephens. After the first jolt of electricity failed to kill him, Stephens struggled for eight minutes before a second charge finished the job. The first jolt took two minutes, and there was a six minute pause so his body could cool before physicians could examine him (and declare that another jolt was needed.) During that six-minute interval, Stephens took 23 breaths.

4. March 13, 1985. Texas. Stephen Peter Morin. Had to probe both arms and legs with needles for 45 minutes before they found the vein.

5. October 16, 1985. Indiana. William E. Vandiver. He was still breathing after the first administration of 2,300 volts, and the current had to be applied three more times

before he died. Vandiver's attorney, Herbert Shaps, witnessed the killing and said it was outrageous. The Department of Corrections admitted the execution "did not go according to plan." The physician who pronounced death said, "This is very rare."

6. August 20, 1986. Texas. Randy Woolls. A drug addict, Woolls had to help the executioner technicians find a good vein for the execution.

7. June 24, 1987. Texas. Elliott Johnson. It took 35 minutes to insert a catheter into his vein.

8. December 13, 1988. Texas. Raymond Landry. Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

9. May 24, 1989. Texas. Stephen McCoy. Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, ect. [sic]) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly."

10. July 14, 1989. Alabama. Horce F. Dunkins. It took two jolts (nine minutes apart) to kill this mentally retarded inmate. The foul-up was caused by "human error:" faulty cable hookups. As a result there was not enough current to cause death. His attorney was Steve Ellis of Philadelphia. Death was pronounced 19 minutes after the first jolt.

11. May 4, 1990. Florida. Jesse Joseph Tafero. When the state replaced a "natural" sponge with a synthetic sponge in the headpiece of the execution apparatus, six-inch flames erupted, and three jolts of power were required to stop Tafero's breathing. Support for the state's faulty sponge theory was generated by sticking a part of it into a "common household toaster" and noting that it smoldered and caught fire. Extensive investigation by the office of the Capital Collateral Investigator in Tallahassee questioned this theory as other states have used synthetic sponges with no problems.

12. October 17, 1990. Virginia. Wilbert Lee Evens. During the electrocution, blood spewed from the right side of the mask on Evans' face, drenching Evens' shirt with blood. Evens' continued to moan after the first jolt of electricity was applied. The autopsy concluded that the blood resulted from high blood pressure brought on by the electrocution.

13. August 22, 1991. Virginia. Derick Lynn Peterson. After a physician determined that the first cycle of electricity had failed to kill Peterson, a second cycle was required. It was the second time this electrical equipment had been used since Virginia's electric chair had been moved to Greenville from the state's old death house in

Richmond. In the aftermath of the execution, prison officials announced that in the future they would routinely administer two cycles before checking for a heart beat.

14. January 24, 1992. Arkansas. Rickey Ray Rector. It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serious brain damage from a lobotomy) tried to help the medical personal [sic] find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outburst."

15. March 10, 1992. Oklahoma. Robyn Lee Parks. Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Said Tulsa World reporter Wayne Greene, "the death looked scary and ugly."

16. April 23, 1992. Texas. Billy Wayne White. It took 47 minutes for authorities to find a suitable vein, and White eventually had to help them.

17. May 7, 1992. Texas. Justin Lee May. May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item (Huntsville),

May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . . " Associated Press reporter Michael Graczyk wrote," He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."

18. May 10, 1994. Illinois. John Wayne Gacy. After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore stopped flowing. Blinds, covering the window through which witnesses observes the execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anethesiologists blamed the problem on the inexperience of the prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

19. May 3, 1995. Missouri. Emmitt Foster. Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses from viewing the scene: they were not reopened until three minutes after death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney: it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty

minutes after the execution began, noticed the problem, and told the officials to loosen the strap so that the execution could proceed.

20. July 18, 1996. Indiana. Tommie Smith. Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his heart, a procedure that took 35 minutes. According to authorities, Smith remained conscious during that procedure.

21. March 25, 1997. Florida. Pedro Medina. With the first jolt of electricity, blue and orange flames sparked from the mask covering Medina's face. Flames up to a foot long shot out from the right side of Medina's head for 6-10 seconds. The execution chamber clouded with smoke, and the smell of burnt flesh filled the witness room.

22. May 8, 1997. Oklahoma. Scott Carpenter. Two minutes after the lethal chemicals began flowing into the body of Scott Carpenter at 12:11 a.m., he began to make noises, his stomach and chest began pulsing, and his jaw clenched. In total, his body mad [sic] 18 violent convulsions, followed by 8 milder ones. His face, which first turned a yellowish gray, had turned a deep purple and gray by 12:20 a.m. He was officially pronounced dead at 12:22 a.m.

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Appendix J

Proposed Bill authorizing Lethal Injection

A bill to be entitled

An act relating to capital punishment; amending s. 922.10, F.S.; providing that a death sentence may be executed by injection of a lethal substance at the option of the convicted person sentenced for crime committed before the effective date; requiring execution of death sentence by lethal injection for persons sentenced for crimes committed on or after the effective date; providing that the administration of a lethal substance does not constitute the practice of medicine; authorizing pharmacists to dispense drugs without prescription; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 922.10, Florida States, is amended to read:

922.10 Execution of death sentence. –

(1)(a) For persons sentenced to death for crimes committed on or after October 1, 1997, a ~~A~~ death sentence shall be executed by lethal injection ~~electrocution.~~

(b) As an alternative method for persons sentenced to death by electrocution for crimes committed prior to October 1, 1997, a death sentence may, at the option of the convicted person, be executed by injection of a lethal substance into the person. The person must communicate his or her decision to the superintendent of the state prison at least 1 week before the date set for the execution.

(2). The lethal substance utilized in executing a death sentence pursuant to subsection (1) shall be specified by rule of the Department of Corrections. If lethal injection is determined to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a death sentence shall be executed by electrocution.

(3) The superintendent ~~warden~~ of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution.

Section 2. The administration of a lethal substance when executing a death sentence which is being carried out by a lethal injection does not constitute the practice of medicine. Any pharmacist may dispense drugs to the superintendent of the state prison or his designee, without prescription, to execute a sentence of death by lethal injection, and the dispensing to the superintendent of the state prison or his designee of such drugs is not grounds for disciplinary action against the pharmacist by any administrative board or agency.

Section 3. The Department of Corrections shall adopt rules with respect to the communication by a person sentenced to death of his or her decision as to the method of execution and with respect to his or her decision to change that decision at any time before the date upon which the decision may not be changed.

Section 4. This act shall take effect on October 1, 1997.

Supreme Court of the United States

No. 99-6723

Anthony Braden Bryan

v.

Michael W. Moore, Secretary,
Florida Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Florida.

UPON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 26, 1999